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NO.

In the Supreme Court of the United States

OCTOBER TERM, 1984

JEFFERSON COUNTY COMMUNITY CENTER FOR DEVELOPMENTAL DISABILITIES, INC.
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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85 pp

QUESTIONS PRESENTED FOR REVIEW

I. Did the United States Court of Appeals For the Tenth Circuit Err In Holding That The Jefferson County Community Center For Developmental Disabilities, Inc., An Organization Established And Operated Pursuant To The Colorado Community Center Act To Provide Education And Training To the Developmentally Disabled In Jefferson County, Colorado, Is Not A "Political Subdivision" Of The State Of Colorado And Is, Thus, An "Employer," Within The Meaning Of Section 2(2) Of The National Labor Relations Act, As Amended?

II. Did The United States Court Of Appeals For The Tenth Circuit Err By Failing To Remand This Case To The National Labor Relations Board For Reconsideration In Light Of The NLRB's Decision To Review Its Regional Director's Finding That Another Colorado Community Center, Identical In All Relevant Aspects To The Jefferson County Community Center for Developmental Disabilities, Inc., Is Not A Political Subdivision Of The State Of Colorado?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings in the United States Court of Appeals for the Tenth Circuit were The Jefferson County Community Center for Developmental Disabilities, Inc., which has no parent company, subsidiary, or affiliate, and the National Labor Relations Board.

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NO. _____

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Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioner, Jefferson County Community Center for Developmental Disabilities, Inc., respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit enforcing orders issued by the National Labor Relations Board against Petitioner, Jefferson County Community Center for Developmental Disabilities, Inc.

OPINIONS BELOW

The opinion of the Court of Appeals, which appears at Appendix A hereto, is officially reported at 732 F.2d 122 and is unofficially reported at 116 LRRM 2063. The Court of Appeals reviewed two orders of the National Labor Relations Board which were consolidated for hearing before the Court of Appeals. The first Decision and Order of

the National Labor Relations Board, contained in Appendix D hereto, is reported at 259 NLRB No. 22 and is unofficially reported at 108 LRRM 1376. The second Decision and Order of the National Labor Relations Board, contained in Appendix E hereto, is officially reported at 263 NLRB No. 32 and is unofficially reported at 111 LRRM 1056. The unreported administrative opinion in the underlying representation case No. 27-RC-5990 before the National Labor Relations Board is the Decision and Direction of Election of the Regional Director, contained in Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals was dated May 14, 1984, and entered on that same day. The order of the Court of Appeals denying the Petition of Jefferson County Community Center for Developmental Disabilities, Inc., for Rehearing and Suggestion for Rehearing *En Banc* was dated and entered June 25, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Section 2(2) of the National Labor Relations Act, as amended, 29 U.S.C. §152(2):

> The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

Sections 8(a)(1) and (5) of the National Labor Relations Act, as amended, 29 U.S.C. §158(a)(1), (5):

> (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157 of this title;
>
> . . . . .

> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

The Colorado Community Centers Act, Colo. Rev. Stat. 1973 §27-11-101 *et seq.*, which is reproduced verbatim as Appendix H hereto.

The general provision of the Colorado Revised Statutes defining "Public School," Colo. Rev. Stat. 1973 §22-1-101:

> A public school is a school that derives its support, in whole or in part, from moneys raised by a general state, county, or district tax.

STATEMENT OF THE CASE

The Jefferson County Community Center for Developmental Disabilities, Inc., hereinafter referred to as the "County Center," petitions this Court for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit to review and set aside the decision (Appendix A) and judgment (Appendix F) of that Court enforcing the decisions and orders of the National Labor Relations Board in its Cases No. 27-CA-7349 (Appendix D) and 27-CA-7786 (Appendix E). In those cases, the NLRB, having adopted the decision of its Regional Director in the underlying representation case, No. 27-RC-5990, (Appendix B), found the County Center to be in violation of Sections 8(a)(1) and (5) of the Act, 29 U.S.C. §158 (a)(1), (5).

Although, technically, the Court of Appeals' decision enforces the NLRB's decisions and orders in two unfair labor practice cases, the questions of which the County Center seeks review by this Court arise from the decisions of the NLRB in the representation case. The course of the underlying representation proceedings below is as follows:

On February 1, 1980, an organization calling itself The Community Center Professional Employees Association, hereinafter referred to as the "Association," filed a petition for certification of representative for a unit of professional and technical employees of the County Center, pursuant to Section 9 of the National Labor Relations Act, 29 U.S.C. §159, with Region Twenty-Seven of the NLRB.

The County Center, a publicly funded and governed entity established pursuant to an act of the Colorado General Assembly to pro-

vide special education and training to mentally handicapped individuals, contested the petition, taking the position that the County Center is a "state or political subdivision thereof" within the meaning of Section 2(2) of the National Labor Relations Act, 29 U.S.C. §152(2), and, thus, that the NLRB has no jurisdiction over the County Center.

Following hearings on the questions of jurisdiction and the appropriate bargaining unit, the Regional Director issued his decision and Direction of Election (Appendix B) in which he found that the County Center is an "employer" within the meaning of the Act, that it meets the health care standards for NLRB jurisdiction, and that the appropriate unit is essentially that petitioned for by the Association.

Because certain categories of employees included in the unit were determined to be professionals, the Regional Director established two voting groups and directed a "Globe" election by which the professional employees were to vote first on the question of whether to include the non-professionals in a single bargaining unit. Both voting groups were then entitled to vote on the question of representation.

The County Center's request to the NLRB for review of the Regional Director's decision, including specifically his decision on the "political subdivision" issue, was denied. (Appendix C).

On August 1, 1980, the election was held as directed.

The County Center filed timely objections to conduct affecting the results of the election and to the conduct of the election itself. On March 24, 1981, the NLRB issued its Decision, Direction and Order, overruling several of the County Center's challenges to ballots, sustaining others, and sustaining one of the objections, and ordered a new election.

On May 4, 1981, the second election was held. In this election, the professional employees voted to exclude the non-professional employees. On the question of representation, the professionals voted for representation by a margin of 53-19. The non-professional employees voted against representation by a margin of 55-17. There were 4 challenged ballots, a number insufficient to effect the result of the election.

On May 19, 1981, the Acting Regional Director issued a Supplemental Decision and Certification of Representative, certifying the Association as collective bargaining representative for the unit of pro-

fessionals. The County Center filed a timely request for review with the NLRB, which summarily denied the review.

In order to obtain judicial review of the NLRB's decisions, the County Center refused to bargain with the Association, and on June 15, 1981, the Regional Director issued a Complaint and Notice of Hearing, alleging that the County Center had violated Sections 8(a)(1) and (5) of the Act, 29 U.S.C. §158(a)(1), (5). The County Center answered and raised as an affirmative defense, among others, its objection to the NLRB's jurisdiction.

On July 21, 1981, the General Counsel filed a Motion for Summary Judgment. The NLRB granted the Motion for Summary Judgment and issued its Decision and Order of November 9, 1981, (Appendix D) incorporating by reference the records of the underlying representation case, pursuant to §9(d) of the Act, 29 U.S.C. §159(d), and holding that (1) the County Center is an "employer engaged in commerce" within the meaning of §2(6) and (7) of the Act; (2) the unit as certified by the Regional Director is an appropriate bargaining unit; and (3) the Association was correctly certified as the collective bargaining representative for that unit of employees. On the basis of those findings, the NLRB ruled that the County Center had violated Sections 8(a)(1) and (5) of the Act by refusing to bargain with the Association and ordered that the County Center bargain upon request with the Association.

On November 25, 1981, the County Center filed a timely Petition for Review with the United States Court of Appeals for the Tenth Circuit, asking that the Court of Appeals review and set aside the decision and order of the NLRB in its case No. 27-CA-7349, entered on November 9, 1981. The Court of Appeals' jurisdiction was conferred by Section 10(f) of the National Labor Relations Act, 29 U.S.C. §160(f).

In January of 1982, after the County Center's Petition for Review of the NLRB's order of November 9, 1981, had been docketed as Case No. 81-2338 by the Court of Appeals, the Association renewed an earlier request to the County Center for certain materials and information, claiming that such information was necessary to its representation of the certified bargaining unit, the validity of which certification was then in question in the Court of Appeals. The County Center responded that it would not provide such information until the validity of the certifica-

tion and the jurisdiction of the NLRB to make such a certification had been determined in the Court of Appeals. The Association filed a charge of unfair labor practices with the NLRB on or about March 31, 1982, and on April 22, 1982, the Regional Director issued a Complaint and Notice of Hearing, alleging that the County Center had violated Sections 8(a)(1) and (5) of the Act, 29 U.S.C. §158(a)(1), (5). The County Center answered and raised as affirmative defenses its objections to the NLRB's assertion of jurisdiction over the County Center.

On May 22, 1982, the General Counsel filed a Motion for Summary Judgment. The NLRB granted the Motion for Summary Judgment and issued its Decision and Order of August 13, 1982, (Appendix E) incorporating by reference the records from the underlying representation case, pursuant to Section 9(d) of the Act, 29 U.S.C. §159(d), and holding that (1) the County Center is an "employer engaged in commerce" within the meaning of the Act and is subject to its jurisdiction; (2) the unit as determined by the Regional Director is an appropriate bargaining unit; and (3) the Association was correctly certified as the collective bargaining representative for that unit of employees. On the basis of those findings, the NLRB ruled that the County Center had violated Sections 8(a)(1) and (5) of the Act by refusing to bargain with the Association and ordered that the County Center bargain upon request with the Association.

On August 31, 1982, the County Center filed its Petition for Review of the NLRB's order of August 13, 1982. That case was docketed by the Court of Appeals as its No. 82-2052. On September 22, 1982, the County Center filed its motion to consolidate the Court of Appeals' cases, Nos. 81-2338 and 82-2052, on the grounds that they raised identical issues between the same parties. That motion was granted by order entered September 30, 1982.

Following the filing of briefs and oral argument to a three judge panel of the Court of Appeals, the Court of Appeals issued its decision on April 16, 1984, concluding that, as a matter of law, the County Center is not a "political subdivision" of the State of Colorado and thus is not exempt from the NLRB's statutory jurisdiction. Enforcement of the NLRB's order was granted. Judgment was entered on May 14, 1984.

On May 29, 1984, the County Center filed its Petition for Rehearing and Suggestion for Rehearing *En Banc*. By order dated June 25, 1984, that Petition for Rehearing was denied.

REASONS FOR ALLOWING THE WRIT

I. THE COURT OF APPEALS' DECISION IS IN CONFLICT WITH THE DECISION OF THIS COURT IN *NATIONAL LABOR RELATIONS BOARD v. NATURAL GAS UTILITY DISTRICT OF HAWKINS COUNTY* ON THE PROPER INTERPRETATION OF THE TERM "POLITICAL SUBDIVISION" UNDER §2(2) OF THE NATIONAL LABOR RELATIONS ACT.

This is a case in which the Court of Appeals has, in effect, reviewed and affirmed a decision of the Regional Director of the NLRB's Region Twenty-Seven, inasmuch as the NLRB itself summarily denied the Center's request for review of the Regional Director's decision of the jurisdictional issues raised in the underlying representation case. In so doing, the Court of Appeals has brought itself into conflict with this Court's decision in *National Labor Relations Board v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600, 29 L.Ed. 2d 206, 91 S. Ct. 1746 (1971). The Court of Appeals' decision also conflicts with several National Labor Relations Board cases interpreting §2(2) of the Act, based upon this Court's decision in *Natural Gas Utility District, supra*.

In *Natural Gas Utility District, supra* this Court concluded that Federal law, rather than State law, governs the determination of whether an entity is a "political subdivision." 402 U.S. at 602-603. In defining the tests for political subdivision status, the Court adopted as correct and quoted from the decision of the United States Court of Appeals for the Fourth Circuit in *National Labor Relations Board v. Randolph Electric Membership Corporation*, 343 F.2d 60, 62-63 (4th Cir. 1965):

> [I]t is clear that...it is to the actual operations and characteristics of [respondents] that we must look...

402 U.S. at 603-604.

This Court took note of the NLRB's test for political subdivision status, consisting of two alternatives: That the entities be "(1) created directly by the state, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate." 402 U.S. at 604-605. The Court declined to rule that the NLRB's test was con-

trolling, but did find that the utility district met the second alternative of the test in that it was administered by individuals who were responsible to public officials. 402 U.S. at 605.

The utility district in that case was one of nearly 270 utility districts established under a Tennessee utility district law for the purpose of providing a broad range of public services. The utility district was formed when 38 private, property owners submitted a petition to the County Court to incorporate the utility district. The utility district was a non-profit corporation administered by a board of commissioners *appointed* by a County Judge *from a list of persons nominated in the petition submitted by the private individuals* seeking to create the utility district. Vacancies on the board were filled by appointment by the County Judge, but only if the remaining two commissioners could not agree on a replacement. 402 U.S. at 607-608. The Court, in finding political subdivision status, also made it clear that other facts than those found in the NLRB's 2-prong test could also be considered in determining "political subdivision" status. The Court noted as persuasive the facts that the utility district was a non-profit corporation; was declared, by state statute, to be a "municipality" or "public corporation;" was tax exempt; that the records of the utility district were public records; and that the commissioners served for only a nominal compensation.

The County Center was established in 1964 pursuant to the provisions of the Community Center law passed by the Colorado General Assembly in 1963, Colo. Rev. Stat. 1973 §27-11-101 *et seq.*, which provides the means for the establishment of community centers to provide programs for trainable mentally retarded and seriously handicapped or developmentally disabled children. The County Center was established to serve a particular "catchment area," which includes Clear Creek, Jefferson, Gilpin, and Summit Counties in the State of Colorado. As is each of the other Community Centers in the State of Colorado, the Jefferson County Center is limited to providing services in its own "catchment area." The programs provided by the County Center are provided as an alternative to institutionalization at one of the two State residential institutions. The County Center provides an education program for individuals of ages 5 to 21 which serves as a substitute to that provided by the Jefferson County R-1 School District but offers additional therapies and training. These programs and others are provided in a number of facilities, including two schools built with Jefferson

County funds, one of which was built on land provided by Jefferson County.

The County Center is managed by its Board of Directors, which is composed of 8 appointed members and 5 to 7 elected members. The appointed members are appointed annually, one each by each of the following public agencies: The Jefferson County R-1 School District, The Public Health Department of Jefferson County, The Social Services Department of Jefferson County, The Mental Health Department of Jefferson County, The Vocational Rehabilitation Department of Jefferson County, The Board of County Commissioners of Jefferson County, The Colorado State Home and Training School at Ridge, and The Jefferson County Association for Retarded Citizens. The Association for Retarded Citizens is a non-profit organization whose membership includes any person who wishes to join and which uses State funds to monitor and review public and private programs for handicapped individuals.

Ninety-five percent of the funding for the County Center comes from State, local and Federal governmental funding. The internal operations of the County Center, including staffing, procedures for dealing with clients, facilities, transportation, personnel credentials, staffing ratios, and virtually every other aspect of its operations are governed by rules and regulations promulgated by the governmental agencies with which the County Center interacts, including regulations which govern other governmental agencies as well. The budget of the County Center is subject to direct review and approval by the Board of County Commissioners for Jefferson County, and the budget, including the amounts assigned to various aspects of the operations, may not be changed without the permission of the Board of County Commissioners. State appropriations to the County Center are made by the Legislature on a line-by-line basis, with amounts designated to various portions of the program. Employees are participants in the Federal Social Security program by virtue of a voluntary decision of the Board of Directors. The records of the County Center are public records. The County Center is tax-exempt. The County Center's schools are funded by the same authorized tax revenue base by which the Jefferson County R-1 School District is funded. As an organization providing education to school-aged children with moneys raised by general taxes from the State, County, and the School District, the County Center is, by statute, defined as a "public school." Colo. Rev. Stat. 1973 §22-1-101.

In applying the ruling in *Natural Gas Utility District, supra*, to this case, the Court of Appeals erred, and its decision conflicts with the teachings of *Natural Gas Utility District*. In applying the second branch of the NLRB's test, the Court of Appeals totally misconstrued this Court's decision in *Natural Gas Utility District*. First the Court of Appeals established a requirement that a majority of the Board of Directors meet the test, a requirement not suggested by this Court in *Natural Gas Utility District,* and then erroneously applied that requirement to conclude that a majority of the County Center's Board was not composed of "individuals who are responsible to public officials or to the general electorate." That conclusion is clearly in error since seven of the fifteen members of the Board are appointed by State or county agencies and the eighth is appointed by an organization funded by the State, the membership of which is, in effect, the general electorate.

The Court of Appeals further erred in its finding that, since the composition of the Board of Directors is not established by statute, the inclusion of officials appointed by State and county agencies is without effect. No such requirement was established or even suggested by this Court in *Natural Gas Utility District*.

The Court of Appeals also erred in applying the first prong of the test approved in *Natural Gas Utility District,* i.e. whether the entity was "created directly by the state, so as to constitute a department or administrative arm of the government." The Court of Appeals cites the facts in *Natural Gas Utility District* as supportive of its finding that, because the State of Colorado did not directly initiate action to incorporate the County Center, the County Center was not "created by the State" within the meaning of the test. The Court of Appeals erred in placing too narrow a definition on the term "created " while placing no significance on the remaining language of the test: "so as to constitute departments or administrative arms of the government."

The Court of Appeals is, thus, again in conflict with *Natural Gas Utility District* since the factual situation in that case was directly akin to that in this case. In *Natural Gas Utility District,* as in the case of the County Center, the entity in question was created by the actions of private individuals to operate under the provisions of a State statute *allowing* for the creation of such a specific type of entity. There was no specific action by the State to create the specific utility district in ques-

tion. In the case of the County Center, the State's statute provides for the creation and funding of community centers, and the Jefferson County Center was incorporated to operate under that statute and could not function as incorporated without that statute. Accordingly, it was "created by the State" within the natural meaning of the test.

Moreover, the Court of Appeals' decision ignores the NLRB's decisions on the subject despite the NLRB's primary role in interpreting §2(2) of the Act. See e.g. *National Labor Relations Board v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600, 605, 29 L.Ed. 2d 206, 210, 91 S. Ct. 1746 (1971). The Court of Appeals was cited to several decisions of the National Labor Relations Board which construed the term "political subdivision" under §2(2) of the Act in light of this Court's decision in *Natural Gas Utility District*. In factual situations similar to and, in fact, less compelling than those of the County Center, the NLRB found that the organizations in question were entities created by the respective states to act as their administrative arms and were, therefore, "political subdivisions," exempt from the NLRB's jurisdiction. See, e.g. *Northampton Center for Children and Families, Inc.*, 257 NLRB No. 114, 108 LRRM 1008 (1981) (Center incorporated as private, non-profit corporation with tax exempt status and administered by a board of directors composed of 13 private individuals, none of whom was a State official or appointed by the State, was "created directly by the State so as to constitute a department or administrative arm of the government."); *Jervis Public Library Association, Inc.*, 262 NLRB No. 145, 110 LRRM 1453 (1982) (Library association incorporated by private individuals pursuant to laws applicable to the incorporation of libraries in general, either public or private, was a political subdivision of the State of New York). See also *Rosenberg Library Association*, 269 NLRB No. 197, 116 LRRM 1051 (1984) (Library opened pursuant to the terms of the will of a private individual and governed by a board of trustees composed of private individuals was "an administrative arm" of the State and thus a "political subdivision.") (Case decided after Court of Appeals' decision.)

In summary, the Court of Appeals' decision contravenes not only the letter and the spirit of this Court's decision in *Natural Gas Utility District, supra*, but also the decisions of the National Labor Relations Board to which it claims to be giving deference.

II. THE COURT OF APPEALS ERRED BY FAILING TO REMAND THIS CASE TO THE NLRB FOR FURTHER CONSIDERATION WITH THE CASE OF ANOTHER COLORADO COMMUNITY CENTER, ITS JURISDICTION OVER WHICH THE NLRB HAS DECIDED TO REVIEW.

After the County Center's case had been submitted to the Court of Appeals on briefs and by oral argument, another community center in southwestern Colorado, Southwest Services for Developmental Disabilities, Inc., was the subject of a representation petition before the Regional Director of the Twenty-Seventh Region of the National Labor Relations Board. This community center was established in the same manner as was the Jefferson County Center and was very similar in every way, with the exception that its board of directors was comprised entirely of private individuals, none of whom were appointed by any identifiable government agency. As he had done in the Jefferson County Center case, the Regional Director ruled that Southwest Services for Developmental Disabilities was not a "political subdivision" of the State of Colorado and was, thus, an "employer" within the meaning of §2(2) of the Act. However, the National Labor Relations Board decided to review the Regional Director's Decision and Direction of Election on the specific issue of the NLRB's jurisdiction and, specifically, the status of Southwest Services for Developmental Disabilities as a "political subdivision." Copies of the pertinent parts of the Regional Director's Decision and Direction of Election and the NLRB's mailgram advising that the NLRB would review that decision with regard to the jurisdictional issues raised are contained herewith as Appendices I and J respectively.

In its petition for rehearing, the County Center argued that, in light of the clear possibility of conflicting decisions resulting in one community center being treated as a "political subdivision" not subject to NLRB jurisdiction and another as not, the Court of Appeals should remand the case to the National Labor Relations Board. The Court of Appeals denied that position and declined to remand to the NLRB. In doing so, the Court of Appeals abused its discretion.

CONCLUSION

The Petitioner, Jefferson County Community Center for Developmental Disabilities, Inc., respectfully requests the Court to issue a Writ of Certiorari to the Tenth Circuit Court of Appeals to review its decision in this matter.

Respectfully submitted.
STETTNER, MILLER AND COHN, P.C.

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Attorney for Petitioner Jefferson
County Community Center for
Developmental Disabilities, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this _____ day of September, 1984, three copies of the Petition for Writ of Certiorari were deposited in the United States Mail, first class postage prepaid, to each of the following:

Mr. Elliot Moore
Deputy Associate General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20470

Mr. W. Bruce Gillis, Jr.,
Regional Direction
National Labor Relations Board
Region Twenty-Seven
260 New Custom
721 19th Street
Denver, Colorado 80202

Solicitor General
Department of Justice
Washington, D.C. 20530

I further certify that all parties required to be served have been served.

_____

Lawrence W. Marquess

APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

JEFFERSON COUNTY COMMUNITY CENTER FOR DEVELOPMENTAL DISABILITIES, INC.,	)	
Petitioner,	)	
v.	)	No. 81-2338 82-2052
NATIONAL LABOR RELATIONS BOARD,	)	
Respondent.	)	

On Petition for Review and Cross-Application
for Enforcement of an Order of
the National Labor Relations Board
(Case No. 27-CA-7786)

Lawrence W. Marquess of Bradley, Campbell & Carney, Golden, Colorado, for Petitioner.

Helen Morgan, Attorney (William A. Lubbers, General Counsel; John E. Higgins, Jr., Deputy General Counsel; Robert E. Allen, Associate General Counsel; Elliott Moore, Deputy Associate General Counsel, with her on the brief), National Labor Relations Board, Washington, D.C., for Respondent.

Before McWILLIAMS, LOGAN, and SEYMOUR, Circuit Judges.

SEYMOUR, Circuit Judge.

The Jefferson County Community Center for Developmental Disabilities, Inc. (the Center) petitions this court to review and set aside two orders of the National Labor Relations Board (NLRB or the Board) requiring the Center to bargain with and supply information to the Community Center Professional Employees Association (the Association). The Board has cross-applied for enforcement of both orders. On appeal, the Center raises a number of challenges to the Board's jurisdiction and attacks the conduct of the representation election. Principally, the Center contends that is is a political subdivision of the state of Colorado and therefore is exempt from NLRB jurisdiction under section 2(2) of the National Labor Relations Act, 29 U.S.C. §152(2) (1982) (the Act). We find the Center's arguments unpersuasive and accordingly grant enforcement of the Board's orders.

I.

The Center is a nonprofit Colorado corporation established in 1964 to provide a variety of education and vocational services for mentally retarded and seriously handicapped individuals. As an alternative to institutionalization, it offers these services pursuant to a "community-centered program" enacted by the Colorado General Assembly to assist the handicapped and retarded. *See* Colo. Rev. Stat. §§ 27-11-101 to -106 (1973). The Center operates two schools, three sheltered workshops, and nine residential facilities in a four-county area in Colorado

In February 1980, the Association filed a petition with the NLRB, seeking certification as the collective bargaining representative of a unit of professional and technical employees at the Center. Following three days of hearings, the NLRB Regional Director rejected the Center's contention that it was exempt from the Board's jurisdiction and directed a representation election. He found that the Center was not a political subdivision within the meaning of section 2(2) of the Act, and that it retained sufficient control over its labor relations to bargain effectively. Because certain categories of employees included in the bargaining unit were professionals, the Regional Director established two voting groups — one of professional employees and one of nonprofessionals. He directed the professionals to vote first on whether they wished to be included in a single bargaining unit with the nonprofessionals. *See* 29 U.S.C. § 159(b)(1) (1982). Both groups were then to vote on the representation question.

The election was held in August 1980 with the professional employees voting 37 to 12 in favor of inclusion with the nonprofessionals. This combined unit voted by a slim margin to be represented by the Association, but the Center challenged a number of ballots and objected to the conduct of the election. The Board sustained several of the Center's challenges and objections and directed a second election. The new election was held in May 1981. This time the professional employees voted not to be included in a single unit with the nonprofessionals. The professionals then voted 53 to 19 in favor of representation by the Association. The nonprofessional unit voted against representation by a margin of 55 to 17. The Center again objected to the election, arguing that the inclusion question had already been decided and should not have been redetermined in the second election. The Acting Regional Director overruled the Center's objection and certified the Association as the professional employees' collective bargaining representative. The Center's subsequent request for review by the Board was denied.

In June 1981, acting upon a charge brought by the Association, the Regional Director issued a complaint alleging that the Center had violated sections 8(a)(5) and (1) of the Act by refusing to bargain with the Association. The Center's answer admitted its refusal to bargain and raised as a defense its objection to the Board's jurisdiction. The Board granted the General Counsel's motion for summary judgment and ordered the Center to bargain with the Association. This appeal followed.[1]

II.

Section 2(2) of the Act provides that "[t]he term 'employer' . . . shall not include . . . any State or political subdivision thereof . . . ." 29 U.S.C. § 152(2). Although the term "political subdivision" is not defined in the Act or its legislative history, the Board has long limited the exemption to entities "that are either (1) created

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[1]In March 1982, the Association commenced additional unfair labor practice proceedings based upon the Center's refusal to supply certain relevant information pending this court's consideration of the validity of the certification. The Board found that this conduct also violated sections 8(a)(5) and (1) of the Act, and ordered the Center to supply the requested information. We subsequently granted the Center's motion to consolidate the two actions for purposes of this appeal. The Center raises identical issues in both appeals.

directly by the state, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or the general electorate." *NLRB v. Natural Gas Utility District*, 402 U.S. 600, 604-05 (1971); *Board of Trustees of Memorial Hospital v. NLRB*, 624 F.2d 177, 184 (10th Cir. 1980). In the instant case, the Board accepted the Regional Director's finding that the Center did not qualify as a political subdivision under either alternative of this test. We agree.

The Board has initial responsibility for determining who is an employer for purposes of the Act, *NLRB v. E. C. Atkins & Co.*, 331 U.S. 398, 403 (1947); *Museum Associates v. NLRB*, 688 F.2d 1278, 1280 (9th Cir. 1982); *NLRB v. Pope Maintenance Corp.*, 573 F.2d 898, 902 (5th Cir. 1978), and its construction of its own statutory jurisdiction is entitled to great respect, *Natural Gas Utility District*, 402 U.S. at 605; *NLRB v. Austin Developmental Center, Inc.*, 606 F.2d 785, 789 (7th Cir. 1979). We must accept the Board's determination "if it has a reasonable basis in the evidence and is not inconsistent with the law." *Atkins*, 331 U.S. at 403; *Museum Associates*, 688 F.2d at 1280.

Turning to the first part of the test, it is evident that the Center was not created directly by the state of Colorado as a department or administrative arm of government. The record shows that the Center was organized by a group of individuals as a nonprofit corporation under applicable Colorado laws. No special legislative act brought it into existence. *Compare Natural Gas Utility District*, 402, U.S. at 605-06 (utility district organized under special law requiring finding of public necessity for creation of district); *Crilly v. Southeastern Pennsylvania Transportation Authority*, 529 F.2d 1355, 1358 (3d Cir. 1976) (transportation authority created by act of legislature as agency and instrumentality of commonwealth), *with Truman Medical Center, Inc. v. NLRB*, 641 F.2d 570, 572 (8th Cir. 1981) (medical center organized under Missouri not-for-profit corporation law); *NLRB v. Highview, Inc.*, 590 F.2d 174, 176 (5th Cir.) (nursing home incorporated by private individuals as nonprofit corporation under Georgia law), *modified on other grounds*, 595 F.2d 339 (1979); *NLRB v. Natchez Trace Electric Power Association*, 476 F.2d 1042, 1044-45 (5th Cir. 1973) (electric power association organized by private citizens as nonprofit corporation under Mississippi law).

The record contains no indication that the Center is or was intended to be a department or administrative arm of the state government. It is instead one of some twenty-two community center corporations with which the state department of institutions and other governmental units contract for the purchase of services for the mentally retarded and seriously handicapped. Although the Center may function as an integrated part of a legislative scheme to provide such services, *see* Colo. Rev. Stat. §§ 27-11-101 to -106 (1973),[2] it does so not as a state-created department or administrative arm of government, but essentially as a private contractor. *Cf. Truman Medical Center,* 641 F.2d at 572 (medical center assumed responsibility of city and county for medical care of indigents pursuant to series of contracts, not statutory duty).

As a community board directly furnishing services for the developmentally disabled, the Center plainly functions within the statutory scheme set out above. It is equally evident, however, that this legislation did not "create" the Center or in any way establish it as a department or administrative arm of the state. Even if, as the Center contends, it was created "pursuant" to this legislation and functions as an integrated part of the legislative program, these factors do not qualify the Center as a "political subdivision" for purposes of § 2(2) of the Act.

The Center fares no better under the second branch of the Board's test, as the record contains no evidence that it is "administered by individuals who are responsible to public officials or to the general electorate." *Natural Gas Utility District*, 402 U.S. at 604-05. Management of the Center is vested in a fifteen-member Board of Directors. The corporation's by-laws require that eight members be appointed annually by certain designated organizations, seven of which are public agen-

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[2]The relevant legislation establishes a "community-centered program" to offer services for the mentally retarded and seriously handicapped, Colo. Rev. Stat. § 27-11-101 (1973), and authorizes the state department of institutions and other governmental units to purchase such services "through community incorporated boards or accredited nonprofit sheltered workshops which have been approved by the department of institutions," *id.* § -103(b). The community boards are in turn authorized to purchase these services from approved public or private facilities in the community. If none are available, the board may develop and operate the services directly. *Id.*

cies.[3] The remaining members are elected by the membership of the corporation.[4] Appointed directors may be removed at any time by a majority vote of the Board; elected directors may be removed by a majority of the corporation membership.

The record thus demonstrates that although seven directors are appointed by public agencies under the Center's by-laws, a majority of the Board is neither appointed by nor subject to removal by public officials or the general electorate and has no official connection to any governmental body. Under these circumstances, the Center is not administered by individuals who are accountable to public officials or the general electorate. *Cf. Truman Medical Center, Inc.*, 641 F.2d at 573 (medical center held not political subdivision where 31 of 49 directors neither appointed by nor subject to removal by public officials or general public).

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[3]The parties disagree as to whether the eighth appointed organization, the Jefferson County Association for Retarded Citizens, is a public agency for purposes of this test. The Center contends that the County Association, a voluntary nonprofit organization that monitors and reviews programs for the handicapped, is a public agency and that all of the appointive directors, a majority of the Board, are therefore appointed by government entities. Based on the record of the representation hearing, however, there is substantial evidence to support the Board's conclusion that the Association is not in fact a public agency but is merely the local branch of an independent national organization of citizens concerned with the problems of the handicapped. Although the group receives some governmental funding and its programs are subject to partial review by the state, there is no indication in the record that the County Association was created by statute or that it is in any sense an arm of government.

Even if we were pursuaded that the County Association is a public agency, however, this would not alter our conclusion that the Center is not administered by individuals responsible to public officials or the general electorate. The composition of the Center's Board of Directors is established not by statute but by the by-laws of the corporation, which are subject to amendment by a two-thirds vote of the Board. Thus, to the extent the Directors are accountable to public officials, they are so accountable by choice rather than by law. Such an arrangement does not qualify the Center as a political subdivision under the Board's second test. *See Crestline Memorial Hospital Association, Inc. v. NLRB*, 668 F.2d 243, 245 (6th Cir. 1982).

[4]Members of the corporation include men and women over the age of eighteen residing in the relevant area, employees of an agency within the area that services developmentally disabled people, and "any interested person who qualifies" and so notifies the Center's Board Secretary.

The Center also lacks a number of other attributes commonly associated with political subdivisions, including the powers of taxation, subpoena, and eminent domain, and the authority to issue tax-exempt bonds. *See, e.g., Natural Gas Utility District*, 402 U.S. at 606-09; *Truman Medical Center*, 641 F.2d at 572; *Austin Developmental Center*, 606 F.2d at 789; *Highview*, 590 F.2d at 176-77. Furthermore, the Center is not declared by statute to be a municipality, public corporation, or other such entity, *cf. Natural Gas Utility District*, 402 U.S. at 606, and its employees are not covered by the state's public employee retirement program. In view of all the foregoing, we hold that the Center is not a "political subdivision" within the meaning of § 2(2) of the Act.

III.

The Center argues that even if not a political subdivision of the state, it is subject to such extensive control by governmental agencies that it is entitled to share the state's § 2(2) exemption. Alternatively, the Center maintains that the Board abused its discretion in asserting jurisdiction because the Center lacks sufficient control over its terms and conditions of employment to be capable of effective bargaining.[5] While these are two separate arguments — one pertaining to the Board's statutory jurisdiction, the other to its discretionary exercise of that jurisdiction — the tests are essentially the same. *Compare Austin Developmental Center, Inc.*, 606 F.2d at 789, *with NLRB v. St. Louis Comprehensive Neighborhood Health Center, Inc.*, 633 F.2d 1268, 1270 (8th Cir. 1980), *cert. denied*, 454 U.S. 819 (1981). We must determine whether the Center "retain[s] sufficient control over the employment relationship to engage in meaningful effective bargaining." *Board of Trustees of Memorial Hospital*, 624 F.2d at 185; *see also R. W. Harmon & Sons, Inc. v. NLRB*, 664 F.2d 248, 251 (10th Cir. 1981).

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[5]The Center also contends that it should be exempted from NLRB jurisdiction because it is an adjunct of the Colorado public school system. Although the Board has recently repudiated the "adjunct test," *see Wordsworth Academy*, 262 N.L.R.B. No. 42 (1982), the Center maintains that the test was still viable at the time this case was before the Board and that it should have been applied. However, the Center did not argue its adjunct status to the Board or the Regional Director during the representation proceedings below. Having failed to raise the issue at that time, the Center is precluded from raising it on this appeal. *R. W. Harmon & Son, Inc. v. NLRB*, 664 F.2d 248, 252 (10th Cir. 1981); *see* 29 U.S.C. § 160(e) (1982).

The record establishes that the Center's primary source of income is derived from contracts with and grants from governmental agencies. Pursuant to these funding agreements, the Center is subject to a multitude of government-imposed restrictions and regulations which, it claims, deprive it of sufficient control over its employment relationships to bargain effectively. These include administrative and procedural regulations, budget ceilings and restraints, review and oversight of the Center's program, and a host of standards, guidelines, and specifications directed primarily to the quality of client care provided by the Center, such as staff certification and licensing requirements, mandatory job classifications, program content and eligibility restrictions, and physical plant specifications.

The Center concedes, however, that its Board of Directors has final decision-making authority over the essential terms and conditions of employment, including "wages, fringe benefits, hiring, firing, staffing, personnel policies, final determination of grievances, and virtually every other aspect of labor relations." Brief of Petitioner at 42. These are the "most important incidents of the employer-employee relationship," *Atkins,* 331 U.S. at 413, and they comprise the "bread and butter issues of collective bargaining," *Harmon,* 664 F.2d at 251.

While we do not doubt that the Center's extensive dealings with governmental agencies impede somewhat its ability to bargain with a union, "no employer enjoys total freedom in this regard." *Pope Maintenance Corp.*, 573 F.2d at 904. The Center's position is not substantially distinguishable from that of government contractors generally or, indeed, that of any employer who provides services pursuant to a detailed performance contract. *See, e.g., Denver Post of the National Society of the Volunteers of America v. NLRB,* _____ F.2d _____, _____, No. 82-1157, slip op. at 11-14 (10th Cir. 1984); *Harmon*, 664 F.2d at 250-251; *Austin Developmental Center,* 606 F.2d at 787-90. In any event, the jurisdictional test does not require that an employer control all terms and conditions of employment, but only that he retain enough control to bargain effectively. *Harmon,* 664 F.2d at 251. Here, it is undisputed that the Center substantially controls the "basic bargaining subjects," including wages, benefits, hiring, firing, promotion, discipline, and grievances. *See id.* It is therefore capable of effective bargaining. Under the circumstances, the Board's exercise of jurisdiction was appropriate.

IV.

Finally, the Center alleges that the Board abused its discretion in allowing the professional employees to vote twice on whether to be included with nonprofessionals in a single bargaining unit. We do not agree. Section 9(b)(1) of the Act precludes the Board from placing professional and nonprofessional employees in a single bargaining unit unless a majority of the professionals have consented to such a unit. *See* 29 U.S.C. § 159(b)(1) (1982).[6] Although the professionals did so consent in the first election, the rerun election was not held until nine months later. In view of this substantial time lag, it was not unreasonable for the Board to conduct a new vote on the inclusion issue in order to take into account any turnover among the professional employees that may have occurred during the interim. We see no abuse of discretion.

For the reasons set forth above, the Board's orders in these consolidated actions are enforced.

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[6]Section 9(b)(1) of the Act provides that the Board shall not find any unit appropriate for collective bargaining purposes "if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit . . . ." 29 U.S.C. § 159(b)(1) (1982).

APPENDIX B

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

JEFFERSON COUNTY COMMUNITY CENTER FOR DEVELOPMENTAL DISABILITIES, INCORPORATED,[1]
Employer,

and Case No. 27-RC-5990

COMMUNITY CENTER PROFESSIONAL EMPLOYEES ASSOCIATION,
COLORADO EDUCATION ASSOCIATION, NEA,
Petitioner.

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.[2]

3. The labor organization involved claim(s) to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:[3]

See Page B-4

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit(s) who were employed during the payroll period ending immediately before the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by

COMMUNITY CENTER PROFESSIONAL EMPLOYEES ASSOCIATION,
COLORADO EDUCATION ASSOCIATION, NEA

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior*

Underwear, Inc., 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, 2 copies of an election eligibility list, containing the names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned/Officer-in-Charge, Subregion, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the 27th Regional Office, 260 New Custom House, 721 Nineteenth Street, Denver, Colorado 80202 on or before July 3, 1980. No extension of time to file this list may be granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1717 Pennsylvania Avenue, NW., Washington, D.C. 20570. This request must be received by the Board in Washington by July 9, 1980.

Dated June 27, 1980
at Denver, Colorado

W. Bruce Gillis Jr.
Regional Director, Region 27

Voting Group A:

Therapy Aide, therapy assistants, teacher aide, P.E. assistant, self-care assistant, art assistant, bus aide, recreation assistant, apartment counselor. residential counselor, follow-along counselor, special services driver, printing technician, and "basic/line supervisors."

Voting Group B

All social workers, case workers, counselor/evaluators, placement/follow-up specialists, therapists, nurses, teachers, home economists, behavior modification specialists, parent/student involve-

ment specialists, art/community instructors, vocational training instructor, and nurse assistant.

[1]The name of the Employer appears as amended at the hearing.

[2]The Employer contends it is exempt from the Board's jurisdiction because it is a political subdivision and provides mandated education in satisfaction of the State's statutory obligation and declared purpose to provide educational opportunities to the mentally retarded and handicapped. The State of Colorado enacted a statute providing for community centers to provide public education, training, shelter, and employment for mentally retarded and seriously handicapped persons. The Employer is a provider of these services and is licensed by the State Department of Social Services. The Employer is a nonprofit Colorado corporation, incorporated June 1964. It provides training programs and residential facilties for the mentally retarded and seriously handicapped as an alternative to institutionalization. The members of the corporation are people of a catchment area (Jefferson, Gilpin, Clear Creek, and Summit Counties) or employees of an agency within the catchment area which services developmentally disabled persons. The Employer's corporation is administered by a fifteen-member Board of Directors. The by-laws of the Employer require eight appointed members: a representative from R-1 school district (Jefferson County); Public Health Department (Jefferson County); Social Services Department (Jefferson County); Mental Health Department (Jefferson County); Vocational Rehabilitation Department (Jefferson County); County Commissioner's (Jefferson County); Jefferson County Association for Retarded Citizens (association of concerned citizens and consultants); and Ridge State Home and Training School. There are seven elective members from the corporation, including six who are parents of clients, and one public member-at-large. The by-laws state that at least three members must be parents of retarded children.

The State legislature appropriates funds to the Department of Institutions who in turn contracts with twenty-two community center boards, including the Employer, for their services. The Employer submits a budget to the Department of Institutions and receives a contract for services. The Employer receives approximately 95% State, school district, and Title XX money, approximately 5% local matching funds from Jefferson County Commission's half-a-mil levy, plus supplemental

funding through donations and fee-generated cases. The Center's budget is submitted to the State. The State does not allow any cross-over of funds from one classification to another. Funding from the State and Federal governments is based on the number of clients and their days of enrollment. The Employer supplements their basic programs with CETA and Elementary Secondary Education Act grants. The school district's contribution is based on each student between the ages of 5 and 21.

The Employer serves birth to death clients. Clients from 0 to 2 years are in the infant stimulation classification. These programs are offered partly in the home and partly at the Center with a teacher, therapist, aides, and nursing staff. These persons visit the home once a week, plus, the parent takes the child to the Center for therapy consultation once a week. The Employer has a preschool program for 3 to 5 year olds, which covers therapy, education, training, and self-help skills. The Employer offers educational programs and therapy for ages 5 to 21. Above 18, the clients graduate to a sheltered workshop for education and training. There are residential programs for adults over 18 with group facilities for six to eight people with a counselor, which serves as an alternative to institutionalization for people who cannot live at home or in the community. The Employer has two schools, three workshops, and nine residential facilities. The two school buildings were provided by the school district through a bond issue in 1974. One workshop was partially purchased with donations and a loan was taken out for the remaining balance. An addition to one of the workshops was required through a vocational rehabilitation grant. The property for the Weiland School was a donation of surplus federal property. The Employer reports yearly on the use of the property.

Clients apply to the Center for enrollment, or, if school age, to the Center, or the school district. After receiving the application and release form the Employer assembles any information possible on that individual from other agencies. If school age, the complete file is sent to the school district for assessment and placement of the child. If the client is not school age, an interdisciplinary team would assess the client and determine placement. The interdisciplinary team would consist of a case manager, social worker, therapist, teacher, line supervisor, the parent or whomever might be involved with the client. If the client is under the jurisdiction of an agency, a representative of the agency would be involved in the assessment and placement of that client.

The Department of Institutions monitors the individual programs on a yearly basis. The County Commissioners monitor the budget and get monthly reports. The Employer also reports to the Jefferson County School District and several State agencies about the clients' program and progress.

The Board decided in *National Transportation Services, Inc.*, 240 NLRB No. 99 (1979) when ascertaining whether jurisdiction should be asserted over an employer which appears to maintain close ties to an exempt governmental entity—we shall no longer decline jurisdicition solely because of the relationship between the "purpose" of the exempt entity and the nature of the service provided to it by such an employer. Rather, jurisdictional questions will be resolved by first determining whether the subject employer itself meets the definition of "employer" in Section 2(2) of the Act and—if it does—then determining whether that employer has sufficient control over the employment conditions of its employees to enable it to bargain with a labor organization which represents them. In determining whether an entity falls within the scope of exemption of a political subdivision of Section 2(2) of the Act, the Board requires that the entity: (1) be created directly by the State, so as to constitute a department or administrative arm of the government, or (2) be administered by individuals who are responsible to public officials or to the general public. *N.L.R.B. v. Natural Gas Utility District of Hawkins County, Tennessee*, 420 US 600, 167 NLRB 691. In applying the first of the above tests, I do not consider the record sufficient to warrant the conclusion that the Society is "a department or administrative arm of the government." The Center was not created directly by the State; the record contains no indication that the Center exercises any sovereign power or that the State exercises any supervision or control over the Employer's operations. The Employer does not become a creature of the State by the mere receipt of revenue from a State, *Culinary Alliance and Hotel Service Employees Union, Local 420 (San Diego Civic Facilities Corp.)*, 175 NLRB 161, or occupancy of City (Federal) owned property. *Trans-East Air*, 189 NLRB 185. With respect to the second test, the Center is administered by a majority of individuals who are not responsible to public officials or to the general public. Accordingly, I find the Center is an employer within the meaning of Section 2(2) of the Act. *Minneapolis Society of Fine Arts*, 194 NLRB 371.

With respect to the Center's control over the employment conditions of its employees, the Board of Directors of the Employer has control of its labor relations policies. It hires and fires its employees. The Board has a financial advisory committee that recommends salary schedules and policies which the Board adopts. The salary schedule is reviewed biannually for competitiveness and steps are awarded to employees on an annual basis. The State and other agencies only require the certification of certain staff members. They do not get involved in the hiring, firing, or discipline of staff members unless the person was not meeting their certification standards. The Board sets the vacation policy, benefits, and sick leave policy. The Employer has established its own personnel policies and procedures. The State and other funding sources do not play a role in any policy making for staff members. It is involved with the standard for the client, although the Board also sets client standards. There is an employee grievance procedure, with the Board being the final determinator. The Employer participates in the Federal social security program. The Board provides a health insurance plan through Kaiser and Blue Cross, a life insurance policy, long-term disability insurance plan, retirement plan, workmen's compensation, liability insurance for transportation, and malpractice. The Employer's employees are not covered by the Public Employees' Retirement Act of the State. The Employer hires and fires all employees within its programs without any intervention by the County or State and does not seek prior approval for other personnel actions it wishes to initiate and exercises control over other terms and conditions of employment. The record does not indicate any political subdivision has taken any exception to any of the Employer's personnel practices. While the State or agencies require the Employer to conform to overall guidelines and standards, it does not interject itself into the internal personnel policies of the Employer. The funding sources do not establish salary levels or range, fringe benefits, and other terms and conditions of employment are free from substantial interference from the funding source. Since the Employer has supplemented its programs with funding from grants and other sources, and the State and other agencies do not interfere in its personnel policies, the Employer can effectively bargain over wages and other terms and conditions of employment. I find the Employer subject to the Board's jurisdiction. *D. T. Watson Home for Crippled Children*, 242 NLRB No. 187; *Soy City, Division of R. W. Harmon*, 249 NLRB No. 187.

For the fiscal year ending June 30, 1979, the Employer showed revenues of $3,724,222. Fees and grants from the Federal and State governments accounted for approximately 95% of these revenues. The Employer does the majority of its purchasing of goods through the purchasing department of the R-1 Jefferson County school district. The Employer purchases goods valued at approximately $15,000 directly from outside the State and also receives in excess of $220,000 annually from Federal funds which are transferred directly across state lines. Based on the foregoing, I find that the Employer meets the health care standards for asserting jurisdiction. Accordingly, I find that it would effectuate the purposes of the Act to assert jurisdiction herein. *Mon Valley United Health Services, Inc.*, 227 NLRB 728

[3]The Petitioner seeks a unit of all professional and technical employees, including teachers, teacher aides, nurses, counselors, psychologists, therapists, therapy aides, home economists, social workers, vocational instructors, job placement counselors, and "line supervisors," who work together in direct client contact developing the education and developmental abilities of their students, excluding clerical, service and maintenance employees, guards and supervisors. The Employer's position is that there should be an all-inclusive unit of all employees, and that teachers and therapists are supervisors, therefore, not included in the unit. There are approximately 327 employees of the Employer, including supervisory and managerial personnel. The unit sought by the Petitioner is approximately 175 employees. The Employer is administered by the Board of Directors to whom an executive director reports. Each facility has a department head or principal who reports to the executive director.

The parties stipulated that the social workers, case workers, counselor, evaluator, placement/follow-up specialist, therapists, nurses, teachers, home economist, behavior modification specialist, parent/student involvement specialist, art/community instructor and vocational training instructor were professional employees. Based on the record that these employees are required to have advanced degrees and perform work in their respective fields, this stipulation is received. The parties stipulated that the "line supervisors or basic supervisors" were not supervisors within the meaning of the Act. They are a category of individuals in the Adult Workshop Program. The "line/basic supervisor" supervises ten to fifteen mentally retarded adults working on

basic job skills. Both parties would include the "line or basic supervisors" in the unit. The instructor, Glada St. Clair, would be excluded by the Employer as a supervisor. The instructor's position is similar to a teacher's position. The instructor is involved with and responsible for formulating and implementing the daily program for the adult classes in the workshops. There are two or three "line/basic supervisors" who help implement the program. The instructor would instruct the "line/basic supervisor" the particular goal, skill or education plan that will be worked on that day with the clients. St. Clair does not have the authority to grant time off to the "line/basic supervisors," only report to the facility manager where during the scheduled time it could be advisable for an employee to be granted time off. There is no evidence she recommends hiring, firing or discipline of any employees. To the extent that the instructor directs the work of the "line/basic supervisors" for whom they may be professionally responsible, I do not find the exercise of such authority to confer supervisory status within the meaning of the Act, but rather to be an incident of their professional responsibilities. The instructors shall be included in the unit.

The Employer would exclude the therapists and teachers as supervisors under the Act. The teachers prepare individual education plans for the students. Some teachers have aides/assistants who keep data on clients, work with the student on their skills, and monitor progress. The aide/assistant works with the teacher or therapist in carrying out the program for the student. The Personnel Director screens the aide applicants and sends them to a facility for an interview. The teacher or therapist is requested to submit questions for the interview by the department head or principal who conducts the interview. The teachers and therapists evaluate their aides but the evaluations are not used for wage increases.

The teachers train the aides in their assignments. Only the principal can transfer an aide from one position to another in the school. The teacher can only change an aide's assignment within their area. Only the principal and executive director can grant a leave of absence to an aide. If a termination of an aide is recommended, an independent investigation is done by the principal before recommendation of termination is made to the executive director, then the Board terminates the employee. Teachers have no authority to suspend an aide. If the principal or assistant principal is absent, a staff person is designated as in charge of the facility. The principal signs the time cards for all

employees. Teachers who have aides are not paid any more than teachers who have no aides working with them. The teacher or therapist cannot grant time off to an aide without asking the principal or assistant principal.

The Margaret Walters School employs four language therapists and three occupational therapists. Robyn Long has been designated as prime supervisor for language therapy and Cheryl Alin is the prime supervisor for occupational therapy. There are more therapists than aides or therapy assistants. The prime supervisor designation is for the benefit of the aide/assistant to know who they can go to for direction and guidance. All therapists are responsible for directing the work of the aide/assistant for the students who are assigned to that therapist. All therapists contribute to the evaulation of the aides/assistants, however, the prime supervisor is the person who actually fills out the evaluation report.

The Employer would also exclude the registered school nurse at the Weiland School because she is a supervisor over the nurse assistant. The nurse assistant provides first aid services, emergency attention, evaluation of clients, plus plans education and inservice training for the staff. The nurse assistant has an associate arts degree and is a registered nurse. Both parties contend the nurse assistant is a professional.

Based on the foregoing, I find the instructor, St. Clair, the registered school nurse at Weiland School, teachers, and therapists, including the prime occupational and prime language therepists, are not supervisors within the meaning of the Act. To the extent that these employees direct the work of others for whom they are professionally responsible, I do not find the exercise of such authority enough to confer supervisory status within the meaning of the Act. The Board has been careful to avoid applying the definition of "supervisor" to professionals who direct other employees in the exercise of their professional judgment, which direction is incidental to the practice of their professional responsibility and thus not the exercise of supervisory authority in the interest of the Employer. *Wang Memorial Hospital Association*, 217 NLRB 1015; *Neighborhood Legal Services, Inc.*, 236 NLRB No. 154.

The Petitioner would include several employees who are employed on a grant basis, five teachers, five therapy assistants, two behavior modification specialists, nurse assistant, two therapists, parent/teacher

involvement specialist, two instructors, art assistant, and home economists. The Employer would exclude these employees because they are employed under Elementary Secondary Education Act grants or CETA grants which are time limited. The funds under these grants expire September 30, 1980. The Employer has been receiving the ESEA grants since 1966 and CETA since 1977. The Employer as a matter of policy has indicated both verbally and in writing to all grant employees that they have no means of guaranteeing continued employment if the grants are not renewed each year. The programs provided under the Elementary Secondary Education Act grants are supplementary to the Employer's basic programs.

There is one behavior modification specialist at each school. It is a consulting position where they provide the instructors, case managers, and teachers methods for altering student behavior or incurring behavior they deem appropriate. The nurse assistant is located at the Weiland School and under the direction of the nurse, as previously discussed. The parent/student involvement specialist relates parents, students and programs together for a unified program. The art community instructor develops an art program within the schools and older students' community employment. The home economist is half-time, working in the workshops, providing training to students' home living skills. The vocational training instructor works on community placement, community instruction, transportation to the community and survival skills in the community. The art assistant provides supplemental art programs within the school.

The grant employees are supervised by the same persons as non-grant employees. They must have the same qualifications as other employees in their classifications. The grant employees carry their seniority over if they become a regular staff member. The grant employees are treated the same as staff employees under social security, the only difference being the grant employees do not receive matching employer contributions to the Employer's retirement fund as staff employees. There is no discernible difference in conditions of employment of grant employees and other employees; both are subject to the same regulations, supervision, policies as other employees, and share the same community of interest. The grant employees' indefinite length of employment due to financial constraints facing the "grants" is not a sufficient basis for excluding grant employees from the bargaining

unit. *Mon Valley United Health Services, Inc.*, 238 NLRB No. 129. It is clear that the CETA and ESEA grant employees herein share a substantial work interest with other unit employees. The grant employees are paid a salary comparable to that of the Employer's other employees and receive similar benefits and work hours. I find they shall be included in the unit. *The Workshop Incorporated*, 246 NLRB No. 195.

The Employer would also include the employees working in the residential programs. The Petitioner is willing to participate in an election including these employees. The residential and apartment counselors are responsible for the clients in the community residential facilities; the follow-along counselors are responsible for counseling and supervision of clients living in the community independently and needing the care and service of a counselor; the special service driver for the residential facilities provides transportation and accurate reporting for clients receiving community services and reports to case managers regarding services delivered to clients. The placement follow-up specialist works in conjunction with the residential program because a number of the clients living in the residential programs are also in the workshop and being placed in the community in competitive employment. They all share a community of interest with other employees in the unit and are in direct client contact working with the clients. I shall include the residential employees in the unit.

The recreation assistant is under the supervision of the recreation specialist who serves the entire Center by working with recreational districts to provide recreational services to the Center. The recreation assistant works in the Adult Program providing noontime recreation for the adults in the workshops. The recreational assistant would also coordinate with the P.E. teachers and assists the special olympics program. I find the recreation assistant shares a community of interest with other employees in the unit and is in direct client contact and shall be included in the unit.

The Employer would include in the unit general service employees: maintenance man, custodian, building and ground aide. They keep the physical plant in operation. They are located in the schools, workshops, and administrative offices, with the cafeteria aides at the cafeterias at the schools providing the daily lunch program. The Petitioner would

exclude them because they are not involved in the educational and developmental abilities of the students/clients.

The Employer would include the transportation employees in the unit where the Petitioner would exclude them on the same basis as the general service employees. The transportation employees are mechanics, dispatcher/clerks, drivers and aides. The drivers and aides provide transportation for field trips, and take the clients to the schools and workshops. Presently, the bus aides are working within the schools substituting as teacher aides because of the shortage of teacher aides.

The Employer would include the print technician, quality control/material handling employees, truck driver, secretaries in the adult workshop programs, and records clerk. The Petitioner would exclude all these employees again on the basis of not being directly involved in the education or developmental abilities of the clients. The print technician is responsible for the print shop at the Gray Street facility. The shop prints all the forms needed by the Center. The Center also contracts with other agencies to provide them with printed material. The print technician has clients working with her printing, sorting and packaging the materials. The material handler is responsible for disbursement of all material within the facilities; the workshop driver is responsible for the pick up and delivery of the contracted materials; the quality control employee is responsible for seeing that the contracted orders are completed. The records clerk is responsible for maintaining the students' records, secretarial correspondence for the social work department, and assisting with office duties. One secretary for the workshop keeps the clients' and staff's attendance, coordinates client transportation, schedules the educational therapy programs, and performs other clerical functions. The second secretary works with the "basic/line supervisor" coordinating and calculating the client payroll and acts as receptionist. I find, based on the record, that although the general service employees, transportation employees, records clerk, and adult workshop employees may have some minimum contact with clients, their job functions are essentially to support the efforts of those specially trained employees whose job it is to provide rehabilitation services. Based on this distinction, I find that those employees, except the print technician who works directly with the clients and the bus aides who have dual roles of bus aides and teacher aides (who are included), do not share a sufficient distinct community of interest involved in direct client contact develop-

ing the educational and developmental abilities of the students to constitute a unit appropriate for collective bargaining, and I shall include the print technician and bus aides in the unit. *Chicago School & Workshop for the Retarded*, 225 NLRB 1207.

Virginia County is the secretary at the Weiland School. Kay Rowe is a clerical at the Walters School. The school secretaries' job functions include typing, filing, answering the telephone, calling and assigning substitutes, maintaining the office, and maintaining student files and staff employment files. I find County and Rowe perform basic clerical duties and shall exclude them as office clericals. Doris Martens is the secretary for the residential program. Her job duties include answering the telephone, typing, taking minutes at residential referral committee meetings and keeping client files. I find she is an office clerical and shall exclude her from the unit. Helen Barly is the secretary for the Adult Program at Gray Street. Kathy Halvorsen is the secretary at Kendall Court. Their job duties include typing. Ruth Wallace is the administrative assistant to the workshop's director, Wallace Ragan. Wallace assists the director in handling the workshop production contracts, completion, and payment. The Employer seeks their exclusion as confidential employees because Barly, Halvorsen, and Wallace have access to all staff information concerning hiring, evaluations, and discipline. Regardless of their confidential status, I shall exclude Wallace, Barly and Halvorsen from the unit because they are office clericals and have no community of interest with other employees included in the unit. Calvin Boswell is a mental retardation professional. He supervises the residential counselors trainers, and relief counselors, seeing that the appropriate program is being provided for the residents. He has under his direction approximately twenty employees. He works with the residential director in interviewing, hiring and transferring employees. He has the authority to discipline and recommend termination of employees. I find Boswell is a supervisor within the meaning of the Act and is excluded from the unit. The Employer's chief administrative officer is the executive director, Louise Johnston, who has been in that position since February 1965. Her duties are to implement policy determination by the Board of Directors, make recommendations, and oversee the operation of the Employer's facilities. Norman Selby is the personnel director and has been for approximately twenty months. He screens all job applicants by personal interview, resume, or investigation; posts job vacan-

cies; interprets policy; disciplines and terminates employees working in personnel. Art Hogling is the principal for the Walters School; Wilda Melzdorf is the principal of the Weiland School. They are responsible for the operation of their respective schools. They interview and effectively recommend hiring, firing, and discipline of employees and also grant time off to employees. Dorothy Jochim is the assistant principal at Walters School, and Dewey Bridge is the assistant principal at Weiland School. They work with their principals supervising the staff and seeing that the educational programs are being provided for the students. Robert Goebel is the head custodian at Walters School, and Bob Burns is the head custodian at Weiland School. They are responsible for seeing all custodial maintenance duties are completed at their respective schools. They each have two custodians under their supervision. They assign their job duties and see that the assignments are complete, evaluate their work, and have the authority to discipline the employees. Vickie Toliver is the cafeteria manager at Walters School, and Betty Duran is the cafeteria manager at Weiland School. They assign work to the cafeteria aides, make recommendations on discipline, and evaluate aides. Wallace Ragan is the workshop director in charge of all the adult programs. He is responsible for supervising approximately forty employees, their hiring, firing, and discipline. Virginia Gorman is the facility manager at Gray Street. She has under her direction the intermediate supervisors. She makes recommendations for budget and employment. George Sawano is a unit manager at Gray Street. He has under his supervision and direction four to six "line supervisors." He sees that all work is complete and ready for inspection and shipment. Leslie Smith is unit manager at Gray Street, and Marilyn Collins is unit manager at Kendall Court. They also have four to six "line supervisors" under their supervision and direction. They, along with Sawano, make recommendations to their respective facility managers on the operation of the workshops, completion of work, and have the authority to discipline the line supervisors. Teresa Purdy is the facility manager at Kendall Court. She is responsible for the entire facility and staff. She makes recommendations on budget and staff. Tom Green is the supervisor in charge of the terminal. He has under his direction approximately forty-five employees. He makes recommendations for hiring and firing employees. Connie Kerr is the driver supevisor. She is responsible for driver safety. She works in cooperation with Green in supervi-

sion of the transportation employees. She is also responsible for training and makes recommendations on employee hiring, discipline, and firing. Wayne Avis is the general services supervisor. He has under his direction nine to fifteen employees. He is responsible for upkeep and maintenance of all facilities. He performs evaluations, recommends firing, and disciplines employees. Richard Mason is the residential director, and Robert Ryan is the assistant residential director. They are in charge of all residential facilities and recommend hiring, firing, and discipline of employees. The parties stipulated, and I find, based on the record, that the above-named individuals are supervisors within the meaning of the Act.

Howard Murray is a recreational specialist. He coordinates recreational activities between recreation districts and the Employer. He is also responsible for implementing the special olympics. Mark Gronstal is the contract procurement officer for the workshops. He negotiates contracts with the public for the center and sells the workshops' products. Royce Asnicar is a unit leader/trainer in the workshop. He works with line supervisors and builds apparatus allowing handicapped individuals to work. The parties stipulated, and I find, that the above-named persons are managerial employees and are excluded from the Act.

The parties stipulated that the following are managerial and administrative employees and should be excluded:

Audrey Anderson	Administrative Assistant
Edwinna Brown	Senior Accountant
Debra Kerinke	Personnel Specialist
Eugene Kapaun	Chief Accountant
Patricia McCanna	Bookkeeper
Betty McCaffrey	Attendance/Purchasing
Donald Munro	Business Manager
Jeanne Robinson	Administrative Secretary
Joseph Wilson	Accounting Technician

Based on the parties' stipulation, the above-named individuals shall be excluded from the unit. The parties stipulated, and I find, the social worker, case worker, counselor/evaluator, placement/follow-up specialists, therapists, nurses, teachers, home economist, behavior modification specialist, parent/student involvement specialist, art/com-

munity instructor, and vocational training instructor are professional employees, and since the Board is prohibited by Section 9(b)(1) of the Act from including professional employees in a unit with employees who are not professional unless a majority of the professional employees vote for inclusion in such a unit, the desires of the professional employees as to inclusion in a unit with non-professional employees must be ascertained. I shall, therefore, direct separate elections in the following voting groups:

Voting Group A

Therapy Aide, therapy assistants, teacher aide, P.E. assistant, self-care assistant, art assistant, bus aide, recreation assistant, apartment counselor, residential counselor, follow-along counselor, special services driver, printing technician, and "basic/line supervisors."

Voting Group B

All social workers, case workers, counselor/evaluators, placement/follow-up specialists, therapists, nurses, teachers, home economists, behavior modification specialists, parent/student involvement specialists, art/community instructor, vocational training instructor, and nurse assistant.

The employees in the non-professional Voting Group A will be polled to determine whether or not they wish to be represented by the Union.

The employees in Voting Group B will be asked two questions on their ballot:

(1) Do you desire that the professional employees be included in a unit composed of all professional employees and non-professional employees of the Employer for the purpose of collective bargaining?

(2) Do you desire to be represented for the purposes of collective bargaining by the Community Center Professional Employees Association, Colorado Education Association, NEA?

If the majority of the professional employees in Voting Group B vote "yes" to the first question, indicating their wish to be included in

a unit with non-professional employees, they will be so included. Their vote on the second question will then be counted together with the votes of the non-professional Voting Group A to determine whether or not the employees in the whole unit wish to be represented by the Union. If, on the other hand, a majority of professional employees in Voting Group B vote against inclusion, they will not be included with the non-professional employees. Their votes on the second question will then be separately counted to determine whether or not they wish to be represented by the Union. There is no indication in this record that the Union would be unwilling to represent the professional employees separately if those employees vote for separate representation. However, if the Union does not desire to represent the professional employees in a separate unit, even if those employees vote for such representation, the Union may notify the Regional Director to that effect within ten days of the date of this Decision and Direction of Election.

My unit determination is based, in part, then upon the results of the election among the professional employees. However, I now make the following findings in regard to the appropriate unit.

Excluding all other employees, including general service employees, mechanics, dispatcher/clerk, bus drivers, records clerks, quality control employees, material handling employees, truck drivers, workshop secretaries, office clerical employees, guards, confidential employees, managerial employees, and supervisors as defined in the Act.

APPENDIX C

WESTERN UNION MAILGRAM

NLRB
1717 PENN AVE NW
WASHINGTON DC 20570

1-225459U217004 08/04/80 ICS WA12139
01225 MLTN VA 80/04/80

NLRB REG 27 ATTN REG DIR
721 19th ST RM 260
DENVER, CO 80202

RE JEFFERSON COUNTY COMMUNITY CENTER FOR DEVELOPMENTAL DISABILITIES INC 27 RC 5990. EMPLOYER'S REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION IS HEREBY DENIED AS IT RAISES NO SUBSTANTIAL ISSUES WARRANTING REVIEW, BY DIRECTION OF THE BOARD: DATED AUG. 4, 1980.

ROBERT VOLGER ACT EXEC SECY
NLRB WSH DC 20570

(ARS RUEVDEL 0-25-01-032362)
22:03 EST

MGMCOMP MGM

APPENDIX D

FJZ
259 NLRB No. 22 D—8286
Arvada, CO

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

JEFFERSON COUNTY COMMUNITY CENTER, INC.

and Case 27—CA-7349

COMMUNITY CENTER PROFESSIONAL EMPLOYEES ASSOCIATION, COLORADO EDUCATION ASSOCIATION, NEA

DECISION AND ORDER

Upon a charge filed on June 9, 1981, by Community Center Professional Employees Association, Colorado Education Association, NEA, herein called the Union, and duly served on Jefferson County Community Center, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 27, issued a complaint on June 15, 1981, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on May 19, 1981, following a Board election in Case 27-RC-5990,[1] the Union was duly certified as the exclusive collective-

[1]Official notice is taken of the record in the representation proceeding, Case 27-RC-5990, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co.* v. *Denello*, 269 F. Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

bargaining representative of Respondent's employees in the unit found appropriate; and that, commencing on or about June 3, 1981, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. Thereafter, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint, and raising certain "affirmative defenses."

On July 21, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on July 29, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint and its response to the Motion for Summary Judgment, Respondent admits the request and its refusal to bargain with the Union. It, however, challenges the Union's certification, reiterating its contentions in the underlying representation proceeding that the Board lacks jurisdiction over its operations; that the Regional Director improperly included certain employees and excluded certain others from the bargaining unit; that the Board improperly overruled certain of Respondent's challenges and objections to the first election; and that the Acting Regional Director improperly overruled its objection to conduct affecting the second election.

Review of the record herein, including the record in Case 27-RC-5990, reveals that on February 1, 1980, the Union filed a representation petition under Section 9 of the National Labor Relations Act. On June 27, 1980, after a hearing, the Regional Director issued his Decision and Direction of Election in which he found that the Board had jurisdiction over Respondent, rejecting Respondent's assertions that

it was a political subdivision of the State of Colorado. He also found that Respondent possessed sufficient control over the employment conditions of its employees to enable it to bargain effectively with a labor organization. Further, contrary to Respondent's positions, he included in the bargaining unit certain employees who Respondent asserted were supervisors and employees who were working on 1-year Federal grants and he excluded employees not directly involved in client care or contact. The Regional Director directed an election in two voting groups consisting of professional and nonprofessional employees, respectively. Respondent filed with the Board a timely request for review of the Regional Director's decision in which it reiterated the arguments previously rejected by the Regional Director. On August 4, 1980, the Board denied Respondent's request for review.

Thereafter, the first election was conducted by mail and manual balloting. The professional employees voted 37 for, and 17 against, inclusion in the same unit with the nonprofessional employees, with 12 challenged and 4 void ballots. The overall tally revealed 60 votes for, and 59 against, the Union, with 18 challenged and 3 void ballots.

Respondent challenged the 18 voters on the grounds that they were no longer employed and further asserted that certain of them had been improperly included in the unit. It also filed timely objections to the election alleging, in substance, that certain prounion alleged supervisors had intimidated antiunion or undecided employees; that there were irregularities regarding the mailed ballots; that a ballot of a professional employee should have been voided; that the Board agent interfered with the election; and that a ballot had been fraudulently cast by an ineligible employee. Thereafter, the Regional Director ordered a hearing on Respondent's challenges and objections.

On November 6, 1980, the Hearing Officer issued his report in which he recommended that the challenges to certain ballots be sustained, that the challenges to the remaining ballots be overruled, that the objection relating to the fraudulently cast ballot be sustained, and that the remaining objections be overruled. He further recommended that if, after the issuance of the revised tally, the fraudulently cast ballot was determinative, the election be set aside and a second election be directed. Respondent filed timely exceptions to the Hearing Officer's report. On March 24, 1981, the Board adopted the Hearing Officer's report.

Subsequently, the ballots, the challenges to which had been overruled, were opened and counted and a revised tally issued which revealed that the fradulently cast ballot was determinative. Therefore, in accordance with the Board's March 24 order (not published in volumes of Board Decisions), a second election was conducted on May 4, 1981. The professional employees voted 23 for, and 49 against, inclusion in the same unit with the nonprofessional employees, with 2 challenged ballots. In addition, the professionals cast 53 votes for, and 19 against, the Union, with 2 challenged ballots. The tally for the nonprofessional employees showed 17 votes for, and 55 against the Union, with 2 challenged ballots.

Respondent filed a timely objection to the second election in which it contended that the Regional Office had interfered with the election by allowing the professional employees to vote again on whether they desired to be included in the same unit with the nonprofessional employees. The Acting Regional Director issued his Supplemental Decision and Certification of Representative on May 19, 1981, in which he overruled Respondent's objection, certified the Union as the bargaining representative of the professional employees, and certified the results of the election among the nonprofessional employees. Respondent filed a request for review of the Acting Regional Director's Supplemental Decision which was denied by the Board on June 19, 1981. It thus appears that Respondent is attempting in this proceeding to relitigate issues fully litigated and finally determined in the representation proceeding.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[2]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine

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[2]See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.[3]

On the basis of the entire record, the Board makes the following:

Findings of Fact

I. The Business of Respondent

Jefferson County Community Center, Inc., a Colorado corporation, with its principal office and place of business at Arvada, Colorado, provides educational and health services for the developmentally disabled. During the fiscal year ending June 30, 1979, it had revenues in excess of $3,700,000, and purchased goods valued at $15,000 directly from points outside the State of Colorado. In addition, it receives in excess of $220,000 annually from Federal funds which are transferred directly across state lines.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

[3]Respondent asserts in its answer to the complaint that it was not served with the charge, although it does not renew this contention in its response to the Motion for Summary Judgment nor in its response to the Board's Notice To Show Cause. The record reveals that Respondent was served with the charge.

Respondent also denies pars. 2(c), (d), and (e) of the complaint which allege that during the fiscal year ending June 30, 1979, it had revenues in excess of $3,700,000 and purchased goods valued at $15,000 directly from points outside the State of Colorado, that it receives in excess of $220,000 annually from Federal funds which are transferred directly across state lines, and that it is an employer within the meaning of Sec. 2(2), (6), and (7) of the Act. However, the Regional Director, in asserting jurisdiction in his Decision and Direction of Election, found that for the fiscal year ending June 30, 1979, Respondent had revenues of $3,724,222, that it purchased goods valued at approximately $15,000 directly from outside the State of Colorado, and received in excess of $220,000 annually from Federal funds which were transferred directly across state lines. Subsequently, the Board denied Respondent's request for review in which it raised the issue of jurisdiction, and Respondent does not now offer to adduce any new evidence.

II. The Labor Organization Involved

Community Center Professional Employees Association, Colorado Education Association, NEA, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All social workers, case workers, counselor/evaluators, placement/follow-up specialists, therapists, nurses, teachers, home economists, behavior modification specialists, parent/student involvement specialists, art/community instructor, vocational training instructor and nurse assistant; but excluding office clerical employees, and all guards, nonprofessional employees[4] and supervisors as defined in the Act, and all other employees.

2. The certification

On May 4, 1981, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 27, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on May 19, 1981, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about May 28, 1981, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as

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[4]The complaint inadvertently describes the appropriate unit as excluding professional employees, whereas it is clear from the record that nonprofessional employees are excluded from this unit of professional employees.

the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about June 3, 1981, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since on or about June 3, 1981, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F. 2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. Jefferson County Community Center, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Community Center Professional Employees Association, Colorado Education Association, NEA, is a labor organization within the meaning of Section 2(5) of the Act.

3. All social workers, case workers, counselor/evaluators, placement/follow-up specialists, therapists, nurses, teachers, home economists, behavior modification specialists, parent/student involvement specialists, art/community instructor, vocational training instructor and nurse assistant; but excluding office clerical employees, and all guards, nonprofessional employees and supervisors as defined in the Act, and all other employees, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since May 19, 1981, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about June 3, 1981, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Jefferson County Community Center, Inc., Arvada, Colorado, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Community Center Professional Employees Association, Colorado Education Association, NEA, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All social workers, case workers, counselor/evaluators, placement/follow-up specialists, therapists, nurses, teachers, home economists, behavior modification specialists, parent/student involvement specialists, art/community instructor, vocational training instructor and nurse assistant; but excluding office clerical employees, and all guards, nonprofessional employees and supervisors as defined in the Act, and all other employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its offices and facilities copies of the attached notice marked "Appendix."[5] Copies of said notice, on forms provided by the

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[5]In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Regional Director for Region 27, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 27, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. November 9, 1981

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John H. Fanning, Member

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Howard Jenkins, Jr., Member

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Don A. Zimmerman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX E

263 NLRD No. 32

FJZ
D—9096
Arvada, CO

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

JEFFERSON COUNTY COMMUNITY CENTER, INC.

and

Case 27—CA—7786

COMMUNITY CENTER PROFESSIONAL EMPLOYEES ASSOCIATION, COLORADO EDUCATION ASSOCIATION, NEA

DECISION AND ORDER

Upon a charge filed on March 31, 1982, by Community Center Professional Employees Association, Colorado Education Association, NEA, herein called the Union, and duly served on Jefferson County Community Center, Inc., herein called Respondent or the Employer, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 27, issued a complaint on April 22, 1982, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and the complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

The complaint alleges in substance that on May 24, 1981, following a Board election in Case 27—RC—5990, the Union was duly certified as the exclusive collective-bargaining representative of Respon-

dent's employees in the unit found appropriate;[1] that on August 31, 1981, and at all times thereafter, the Union has requested Respondent to furnish it with the names and addresses of employees in the bargaining unit, copies of Respondent's employee policies and procedures, its current and proposed budget, and all minutes of Respondent's Board meetings since May 1981; and that on January 22, 1982, and at all times thereafter, Respondent refused to furnish the Union with the requested information in violation of Section 8(a)(5) and (1) of the Act. On April 28, 1982, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On May 22, 1982, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on June 8, 1982, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint and in its response to the Notice To Show Cause, Respondent admits the request and its refusal to supply the Union with the above-described information. However, Respondent challenges the Union's certification, repeating its contentions in the underlying representation proceeding that the Board lacks jurisdiction over its operations because it is a political subdivision or part of a political subdivision of the State of Colorado within the meaning of Section 2(2) of the National Labor Relations Act; that the Regional Director

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[1]Official notice is taken of the record in the representation proceeding, Case 27—RC5990 31—RC—4316, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 928 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co.* v. *Pennello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

improperly overruled its objection to conduct affecting the second election.

Review of the record herein, including the record in Case 27—RC—5990, reveals that on February 1, 1980, the Union filed a representation petition under Section 9 of the National Labor Relations Act. On June 27, 1980, after a hearing, the Regional Director issued his Decision and Direction of Election in which he found that the Board had jurisdiction over Respondent, rejecting Respondent's assertions that it was a political subdivision of the State of Colorado. He also found that Respondent possessed sufficient control over the employment conditions of its employees to enable it to bargain effectively with a labor organization. Further, contrary to Respondent's position, he included in the bargaining unit certain employees who Respondent asserted were supervisors and employees who were working on 1-year Federal grants and he excluded employees not directly involved in client care or contact. The Regional Director directed an election in two voting groups consisting of professional and nonprofessional employees, respectively. Respondent filed with the Board a timely request for review of the Regional Director's Decision in which it reiterated the arguments previously rejected by the Regional Director. On August 4, 1980, the Board denied Respondent's request for review.

Thereafter, the first election was conducted by mail and manual balloting. The professional employees voted 37 for, 17 against, inclusion in the same unit with the nonprofessional employees, with 12 challenged and 4 void ballots. The overall tally revealed 60 votes for, and 59 against, the Union, with 18 challenged and 3 void ballots.

Respondent challenged the 18 voters on the ground that they were no longer employed and further asserted that certain of them had been improperly included in the unit. It also filed timely objections to the election alleging, in substance, that certain prounion alleged supervisors had intimidated antiunion or undecided employees; that there were irregularities regarding the mailed ballots; that a ballot of a professional employee should have been voided; that the Board agent interfered with the election; and that a ballot had been fraudulently cast by an ineligible employee. Thereafter, the Regional Director ordered a hearing on Respondent's challenges and objections.

On November 6, 1980, the Hearing Officer issued his report in

which he recommended that the challenges to certain ballots be sustained, that the challenges to the remaining ballots be overruled, that the objection relating to the fraudulently cast ballot be sustained, and that the remaining objections be overruled. He further recommended that if, after the issuance of the revised tally, the fraudulently cast ballot was determinative, the election be set aside and a second election be directed. Respondent filed timely exceptions to the Hearing Officer's report. On March 24, 1981, the Board adopted the Hearing Officer's report.

Subsequently, the ballots, the challenges to which had been overruled, were opened and counted and a revised tally issued which revealed that the fraudulently cast ballot was determinative. Therefore, in accordance with the Board's March 24 order (not published in volumes of Board Decisions), a second election was conducted on May 4, 1981. The professional employees voted 23 for, and 49 against, inclusion in the same unit with the nonprofessional employees, with 2 challenged ballots. In addition, the professionals cast 53 votes for, and 19 against, the Union, with 2 challenged ballots. The tally for the nonprofessional employees showed 17 votes for, and 55 against, the Union, with 2 challenged ballots.

Respondent filed a timely objection to the second election in which it contended that the Regional Office had interfered with the election by allowing the professional employees to vote again on whether they desired to be included in the same unit with the nonprofessional employees. The Acting Regional Director issued his Supplemental Decision and Certification of Representative on May 19, 1981, in which he overruled Respondent's objection, certified the Union as the bargaining representative of the professional employees, and certified the results of the election among the nonprofessional employees. Respondent filed a request for review of the Acting Regional Director's Supplemental Decision which was denied by the Board on June 19, 1982. It thus appears that Respondent is attempting in this proceeding to relitigate issues fully litigated and finally determined in the representation proceeding.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior

representation proceeding.[2]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.[3]

On the basis of the entire record, the Board makes the following:

Findings of Fact

I. The Business of Respondent

Jefferson County Community Center, Inc., a Colorado corporation, with its principal office and place of business at Arvada, Colorado, provides educational and health services for the developmentally disabled. During the fiscal year ending June 30, 1979, it had revenues in excess of $3,700,000, and purchased goods valued at $15,000 directly from points outside the State of Colorado. In addition, it receives in

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[2]See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

[3]Respondent asserts in its answer to the complaint that it was not served with the charge, although it does not renew this contention in this response to the Board's Notice To Show Cause. The record reveals that Respondent was served with the charge.

Respondent also denies pars. 2(c), (d), and (e) of the complaint which allege that during the fiscal year ending June 30, 1979, it had revenues in excess of $3,700,000 and purchased goods valued at $15,000 directly from points outside the State of Colorado, that it receives in excess of $220,000 annually from Federal funds which are transferred directly across State lines, and that it is an employer within the meaning of Sec. 2(2), (6), and (7) of the Act. However, the Regional Director, in asserting jurisdiction in his Decision and Direction of Election, found that for the fiscal year ending June 30, 1979, Respondent had revenues of $3,724,222, that it purchased goods valued at approximately $15,000 directly from outside the State of Colorado, and received in excess of $220,000 annually from Federal funds which were transferred directly across State lines. Subsequently, the Board denied Respondent's request for review in which it raised the issue of jurisdiction, and Respondent does not now offer to adduce any new evidence.

excess of $220,000 annually from Federal funds which are transferred directly across state lines.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

Community Center Professional Employees Association, Colorado Education Association, NEA, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All social workers, case workers, counselor/evaluators, placement/follow-up specialists, therapists, nurses, teachers, home economists, behavior modification specialists, parent/student involvement specialists, art/community instructor. vocational training instructor and nurse assistant; but excluding office clerical employees, and all guards, nonprofessional employees and supervisors as defined in the Act, and all other employees.[4]

2. The certification

On May 4, 1981, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 27, designated the Union as their representative for the purpose of collective bargaining with Respondent.

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[4]The complaint inadvertently describes the appropriate unit as excluding professional employees, whereas it is clear from the record that nonprofessional employees are excluded from this unit of professional employees.

The Union was certified as the collective-bargaining representative of the employees in said unit on May 19, 1981, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request to Provide Information and Respondent's Refusal*

We have already found as follows in an earlier case involving respondent:[5] Commencing on or about May 28, 1981, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about June 3, 1981, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit. Accordingly, Respondent has, since on or about June 3, 1981, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of section 8(a)(5) and (1) of the Act.

Commencing on August 31, 1981, the Union has requested Respondent to furnish it with certain data relating to rates of pay, hours and other conditions of employment in the appropriate unit. Commencing on or about January 22, 1982, and continuing at all times thereafter to date, Respondent has refused to furnish the Union with the requested data.

Accordingly, we find that Respondent has, since January 22, 1982, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent, set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and com-

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[5] *Jefferson County Community Center, Inc.*, 259 NLRB No. 22 (1981).

merce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, furnish the union with the data set forth above.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mary-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. Jefferson County Community Center, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Community Center Professional Employees Association, Colorado Education Association, NEA, is a labor organization within the meaning of Section 2(5) of the Act.

3. All social workers, case workers, counselor/evaluators, placement/follow-up specialists, therapists, nurses, teachers, home economists, behavior modification specialists, parent/student involvement specialists, art/community instructor, vocational training instructor and nurse assistant; but excluding office clerical employees, and all guards, nonprofessional employees and supervisors as defined in the Act, and all other employees, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since May 19, 1981, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about January 22, 1982, and at all times thereafter, to furnish the Union with data relating to the unit employees' rates of pay, hours and other working conditions, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to supply requested data, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Jefferson County Community Center, Inc., Arvada, Colorado, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to furnish Community Center Professional Employees Association, Colorado Education Association, NEA, with the requested data relating to rates of pay, hours and other working conditions of employees in the following appropriate unit:

> All social workers, case workers, counselor/evaluators, placement/follow-up specialists, therapists, nurses, teachers, home economists, behavior modification specialists, parent/student involvement specialists, art/community instructor, vocational training instructor and nurse assistant; but excluding office clerical employees, and all guards, non-

professional employees and supervisors as defined in the Act, and all other employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its offices and facilities copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 27, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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[6]In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(c) Notify the Regional Director for Region 27, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. August 13, 1982

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John H. Fanning, Member

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Howard Jenkins, Jr., Member

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Don A. Zimmerman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX F

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JEFFERSON COUNTY COMMUNITY CENTER FOR DEVELOPMENTAL DISABILITIES, INC.,	)	
Petitioner,	)	
v.	)	Nos.
	)	81-2338
	)	82-2052
NATIONAL LABOR RELATIONS BOARD,	)	
Respondent.	)	

JUDGMENT

Before: McWILLIAMS, LOGAN, and SEYMOUR, Circuit Judges.

The above consolidated causes came on to be heard upon the petitions filed by Jefferson County Community Center for Developmental Disabilities, Inc., to review its orders of the National Labor Relations Board issued against Petitioner, its officers, agents, successors, and assigns, on November 9, 1981 and August 13, 1982, and upon cross-application of the National Labor Relations Board to enforce said Orders. The Court heard argument of respective counsel on September 13, 1983, and has considered the briefs and transcript of record filed in this cause. On April 16, 1984, the Court issued its opinion granting enforcement of the Board's orders. In conformity therewith it is hereby

ORDERED AND ADJUDGED by the United States Court of Appeals for the Tenth Circuit that the said orders of the National Labor Relations Board in said proceeding be enforced and that Petitioner, Jefferson County Community Center for Developmental Disabilities, Inc., its officers, agents, successors, and assigns, abide by and perform the directions of the Board in said Orders contained.

Stephanie K. Seymour
Judge, United States Court of
of Appeals for the Tenth Circuit

Dated: May 14, 1984

APPENDIX G

MAY TERM - June 25, 1984

Before Honorable Oliver Seth, Honorable William J. Holloway, Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, and Honorable Stephanie K. Seymour, Circuit Judges

JEFFERSON COUNTY COMMUNITY CENTER FOR DEVELOPMENTAL DISABILITIES, INC.,	)	
Petitioner	)	
vs.	)	No. 81-2338
NATIONAL LABOR RELATIONS BOARD,	)	
Respondent.	)	

This matter comes on for consideration of petitioner's petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision sought to be reheard.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Howard K. Phillips, Clerk

APPENDIX H
Community Centers—Mentally Retarded and Handicapped

27-11-101. Legislative declaration. The general assembly, in recognition of the wide and varied needs of the mentally retarded and of the seriously handicapped persons of this state and of the desirability of meeting these needs on the community level to the fullest extent possible and in order to reduce the need for custodial care in state institutions, establishes by this article a community-centered program through interagency cooperation and coordination of the local agencies that offer services for mentally retarded and seriously handicapped persons and establishes a program to purchase services through community incorporated boards.

27-11-102. Administration of article—rules and regulations. The executive director of the department of institutions has the power to adopt reasonable rules and regulations to govern the administrative proceedings and procedures necessary to carry out the provisions of this article. Such rules and regulations shall be adopted in accordance with the provisions of section 24-4-103, C.R.S. 1973, and may be amended or revoked from time to time. The executive director is also authorized to promulgate standards for and supervise programs supported under this article and to prescribe the form of reports, budgets, holding of meetings, investigations, and evaluations necessarily incident to the administration of this article.

27-11-103. Appropriation—purchase of services. (1) (a) Each year the general assembly shall appropriate funds to purchase services for the mentally retarded and seriously handicapped from community center board corporations, for profit or not for profit, or accredited nonprofit sheltered workshops which have been approved by the department of institutions, on the basis of five percent local funding to be matched by ninety-five percent state funding less any federal or cash funds received for general operating expenses from any other state or federal source and less the required local school district funds as provided under subsection (3) of this section. The yearly appropriation, when combined with all other sources of funding, including local, federal, other state, and school district funds, shall in no case exceed one hundred percent of the approved program costs as determined by the general assembly. Funds that are received for capital construction, specific research, or

enrichment programs which do not create a requirement for future state funding shall not be considered in the calculation for the distribution of funds under the provisions of this section. Boards of county commissioners may levy up to one-half mill for the purpose of purchasing services for the mentally retarded and seriously handicapped from community center boards, corporations, for profit or not for profit, or accredited nonprofit sheltered workshops which have been approved by the department of institutions.

(b) The department of institutions is hereby authorized to purchase services for the mentally retarded and seriously handicapped through community incorporated boards or accredited nonprofit sheltered workshops which have been approved by the department of institutions. Such boards may purchase services from public or private nonprofit sheltered workshops, day care training centers, and other private facilities and from universities, colleges, public schools, boards of cooperative services, and preschool nurseries having approved facilities and offering an approved program. In case such approved facilities and services are not available in the community, the community incorporated board may develop and operate such services directly.

(c) In the purchase of services from community incorporated boards or accredited nonprofit sheltered workshops which have been approved by the department of institutions, the executive director of the department of institutions shall specify levels and types of services to be provided and shall review expenditures in accord with these standards for programs of such centers and other agencies that are supported with funds provided by this article. Such standards shall be in writing and shall be submitted annually in the department's budget to the general assembly. In fulfilling its responsibility, the department of institutions may withhold state funds when the executive director thereof determines that the programs of such centers and other agencies are not in compliance with the standards.

(d) The department of institutions shall submit to the governor and the joint budget committee of the general assembly an annual report of the number of students served under the program, including, as a minimum, the total number served, the number in average daily enrolment by both school age and nonschool age served, and the number of full-time equivalent students served of both school age and nonschool

age. For purposes of this paragraph (d), "full-time equivalent" means a minimum of five hours of program per day. In addition, the report on the services provided shall include, as a minimum, both educational and other services provided, the costs of the services whether state, federally, locally, or privately funded, and a measurable qualitative evaluation of the services rendered.

(e) (I) The department of institutions, acting through the division for developmental disabilities, is authorized to purchase community services for developmentally disabled clients to develop comprehensive oral hygiene programs to prevent dental disease and its attendant costs. Dental hygienists working with the staff of community center board facilities may develop those programs, which may also include annual evaluations by dental hygienists and referrals to dentists in the community for care.

(II) The general assembly each year in the general appropriation bill may require that an amount equal to the state appropriation for services provided in paragraph (e) be obtained from private sources, including donated services, prior to the disbursement by the state treasurer of the state appropriation.

(2) For purposes of allocating moneys under this article, the community boards shall submit to the department a proposed budget, which budget shall include proposed expenditures, including services said boards intend to purchase from various local agencies or institutions that offer services for mentally retarded and seriously handicapped persons.

(3) (a) Governmental units, including but not limited to counties, municipalities, school districts, hospital districts, or state institutions of higher education, are authorized, at their own expense, to purchase services or to furnish money, materials, and services for mentally retarded and seriously handicapped persons through community incorporated boards; except that each school district shall provide to the community incorporated board which supports programs attended by any mentally retarded or seriously handicapped person domiciled in that district, as a minimum, for each such person attending such programs who is less than twenty-one years of age and is at least of such an age that, but for his mental retardation or serious handicap, he would be

enrolled in the regular school program in the district, an amount equal to the authorized revenue base per pupil.

(b) Seriously handicapped and mentally retarded persons as provided for in this article shall be counted as regularly enrolled for purposes of the "Public School Finance Act of 1973."

(4) For purposes of this section, "attendance entitlement" has the meaning ascribed to such term in article 50 of title 22, C.R.S. 1973.

27-11-104 Approval of community-centered programs. (1) In approving or rejecting community-centered programs for the purchase of services to mentally retarded and seriously handicapped persons, the executive director of the department of institutions shall consider the following factors:

(a) The adequacy and utilization of existing approved facilities and programs in the community, such as public and private nonprofit sheltered workshops, public school programs, preschool nurseries, day care centers, and universities and colleges;

(b) The adequacy of participation by state services, including but not limited to public welfare, public health, rehabilitation, and education;

(c) General community interest and participation;

(d) The establishment of programs for prevention of institutionalization and programs for habilitation when they do not already exist.

(2) The executive director shall require the following in the community administration of this program:

(a) Each community-centered program shall be under the control and direction of a board of directors or trustees of a corporation for profit or not for profit.

(b) The members of the board of directors or trustees shall be persons who have demonstrated an interest in programs for mentally retarded and seriously handicapped persons in the community.

(c) The community incorporated board shall make application annually to the department of institutions to participate in the state pro-

gram for mentally retarded and seriously handicapped prsons, and only programs which meet the requirements set forth in subsection (1) of this section shall be approved.

27-11-105. State Coordinating advisory board. Repealed.

27-11-106. Acceptance of federal grants. The executive director of the department of institutions is authorized to accept, on behalf of the state, any grants of federal funds made available for any purposes consistent with the provisions of this article. The executive director, with the approval of the governor, has the power to direct the disposition of any such grants so accepted in conformity with the terms and conditions under which given.

APPENDIX I

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
TWENTY-SEVENTH REGION

SOUTHWEST SERVICES FOR DEVELOPMENTAL DISABILITIES,
Employer,

and Case 27-RC-6406

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL NO. 105,
Petitioner.

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board: hereinafter referred to as the Board.

Pursuant to the provision of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.[1]

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit ap-

propriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:[2]

VOTING GROUP A
Pre-school aide, all full-time and regular part-time residential specialists; BUT EXCLUDING speech and language therapist, speech therapist, occupational therapist, physical therapist, pre-school teacher, case manager, basic skills instructor, educational coordinator, and all home visitors and all other employees including the registered nurse, relief residential specialists, confidential employees, guards, and supervisors as defined in the Act.

VOTING GROUP B
Speech and language therapist, speech therapist, occupational therapist, physical therapist, pre-school teacher, case manager, basic skills instructor, education coordinator, and all home visitors, BUT EXCLUDING pre-school aide, all full-time and regular part-time residential specialists and all other employees including the registered nurse, relief residential specialists, confidential employees, guards, and supervisors as defined in the Act.

An election by secret ballot shall be conducted by the undersigned among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit(s) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligible period and their replacements. Those in the military service of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months

before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL NO 105

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B.* v. *Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, 2 copies of an election eligibility list, containing the names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the 27th Regional Office, 721-19th Street, Room 260, Denver, CO 80202, on or before November 10, 1983. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1717 Pennsylvania Avenue, NW., Washington, D.C. 20570. This request must be received by the Board in Washington by November 16, 1983.

Dated: November 3, 1983

at Denver, Colorado

W. Bruce Gillis, Jr.
Regional Director, Region 27

[1]The Employer is a nonprofit Colorado corporation engaged in providing educational and training services to mentally retarded and seriously handicapped individuals. It provides these services in its "catchment area" consisting of Montezuma, LaPlata, Dolores, San Juan, and Archuleta counties in southwest Colorado. The Employer employs approximately 30 employees and provides services for approximately 100 clients. The education and training services are provided by the Employer through three programs. Children's Services consist of an early childhood development program for children between the ages of zero and three years old, and a pre-school program for children between the ages of three and five years old. The early childhood development program, or infant stimulation, is a home visitation program which provides training for infants in areas such as speech, fine motor coordination and gross motor coordination. The second of the Employer's programs is the Adult Day Program. Through this program, the Employer provides training for clients who are out of the public school system or who are attending as a function of the public school system. The sheltered employment training is provided through a subcontract with the Four Corners Sheltered Workshop. In addition, the Adult Day Program includes basic skills training in such areas as learning leisure time skills, mobility training and the skills which enable clients to move about within the community. Through the Adult Day Program, the Employer also assists clients in finding and holding jobs in the community. The third of the Employer's program is the Residential Program. Through this program, the clients are trained in basic living skills such as cooking and doing laundry. The objective of this program is to train clients in skills which would permit them to live and function in the community with minimal or no supervision. Presently, the Employer has two adult residential group homes, each housing eight clients. In addition, it presently has three apartments used to train and house clients as they progress from the group home environment to a minimally supervised living setting.

Through legislation, the State of Colorado established a program whereby it would purchase services for mentally retarded and seriously handicapped individuals through community incorporated boards. These boards are authorized to purchase these services from public or private suppliers offering approved services. In the event such approved services are not available in the community, the community incor-

porated board is authorized to develop and operate such services directly. The Employer is one of 22 such community centered boards in the State of Colorado, and it contracts with the Colorado Department of Institutions for the provision of these services.

The State legislature appropriates funds to the Department of Institutions which in turn transfers these funds to the individual community centered boards including the Employer. The Employer submits a proposed budget to the Department of Institutions showing proposed expenditures. Also, the Employer must annually make application to the Department of Institutions to receive State funding. The Employer receives approximately 95% of its funding from the State of Colorado and approximately 5% from the counties in its catchment area and the City of Durango. The State's contribution to the Employer's funding is reduced by any funds received from any other state or federal source, and it is also reduced by the required contribution from the school district for clients who are of school age. The Employer has the option of supplementing this revenue and does, in fact, conduct a fund raising dinner annually. There is no indication in the record that the State has any control over how these additional funds are used. Annually, the Employer is required to submit to an audit by an accounting firm which has contracted with the State. However, the Employer bears the expense of this audit.

The Employer is subject to certain rules and regulations promulgated by the Department of Institutions. These rules and regulations establish the general guidelines for certain matters such as referral; admission and placement of clients; confidentiality of client records; the establishment of individual program plans and individual habilitation plans for clients; case management services; and financial and personnel administration. In addition, the Employer must comply with certain rules and procedures for the adminstration of the Colorado Handicapped Children's Education Act. These same rules and regulations also apply to the public school system.

The Employer's general membership is composed of community representatives, including representatives from public and private entities which serve the mentally retarded, seriously handicapped and developmentally disabled. The general membership is solicited from the community-at-large and, according to the Employer's by-laws, shall

include as broad a representation as possible. The Employer's by-laws also specify that the board of directors shall be elected by the general membership on an annual basis and that the board will have a minimum of three representatives from each of Montezuma and La Plata Counties. The board may consist of a maximum of fifteen members and a minimum of six members. Parents or relatives of clients must comprise at least one-third of the board's membership. Presently, there are fourteen board members including a representative from the school district, a representative of the La Plata County Social Services Department, and a representative of the Montezuma County Social Services Department. The day-to-day operations of the Employer, including its labor relations, are administered by the board of directors and the Employer's executive director.

The Employer owns some of its physical facilities and rents the remainder. It utilizes no publicly owned property, although its own property is tax exempt. What facilities the Employer utilizes and their location is not mandated by the State and is soley within the control of the Employer. Its employees do not participate in the public employee's retirement program, and it appears that the fringe benefits offered by the Employer are not the same as those received by public employees, and these benefits are not mandated by the State.

The Employer contends that it is not subject to the Board's jurisdiction as a political subdivision within the meaning of Section 2(2) of the Act. In determining whether an employer is a political subdivision, the Board utilizes a two-prong test and has 'limited the exemption for political subdivisions to entities that are either (1) created directly by the state, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate.' *N.L.R.B.* v. *The Natural Gas Utility District of Hawkins County, Tennessee*, 402 U.S. 600, 604-605 (1971). Based on the record, I find that the Employer is not a political subdivision and is subject to the jurisdiction of the Board. While the program by which the State of Colorado could purchase services for the developmentally disabled and mentally retarded from and through community centered boards was established by legislation, this legislation did not directly create the Employer which was first incorporated in 1966 as La Plata County Board for the Mentally Retarded

and Seriously Handicapped, Inc. Moreover, the Employer's employees do not participate in the public employee retirement program, and their fringe benefits are not mandated by the State of Colorado. Also, although the Employer is subject to certain rules and regulations of the Department of Institutions, the daily operating control of the Employer is exercised by the board of directors and executive director. Additionally, a majority of the Employer's board of directors are private citizens who are not responsible to public officials or to the general electorate. Accordingly, I find that the Employer is an employer within the meaning of Section 2(2) of the Act.

In *National Transportation Services, Inc.*, 240 NLRB 565, the Board determined that it would no longer decline jurisdiction solely because of the relationship between the purpose of the exempt entity and the nature of the service provided to it by an employer. Rather, if an employer itself meets the definition of an "employer" under Section 2(2) of the Act, it must be determined whether this employer has sufficient control over the employment conditions of its employees to enable it to bargain with a labor organization which represents them. Here, the Employer determines the number and types or classifications of employees it will hire. Its policy and procedure manual also shows that the Employer has direct control over the hiring procedure, including the interviewing of applicants; the contents of employee's personnel files; evaluations of employees; discipline of employees, including dismissal; employee benefits; employee remuneration; hours of work; leave and holidays; layoff procedure; and travel and expense procedures. The Employer also has a grievance procedure for the resolution of employee grievances with the board of directors serving as the final decision-maker. Based on the extent of control exercised by the Employer over its employees working conditions, I find that the Employer has sufficient control over these working conditions to enable it to bargain with the Petitioner.

The Employer also contends that the Board should decline to assert jurisdiction because it is an "adjunct" of the public school system. While, after *National Transportation Services., Inc.*, it is doubtful that the Board would decline jurisdiction on this basis alone (See, *D.T. Watson Home for Crippled Children*, 242 NLRB 1368), I find, at any rate, that the Employer is not an adjunct to the public school system. The Employer does perform an education function for the State of Colorado,

which is required to guarantee an education for handicapped and mentally retarded citizens, but this alone is insufficient to make the Employer an adjunct of the public school system. *The Krebs School Foundation, Inc.*, 243 NLRB 514. The Employer alone determines what physical facilities it will maintain, its hours of operation, personnel policies, salaries, and its day-to-day operations. Accordingly, I find that the Employer is not exempt from the Board's jurisdiction as an "adjunct" of the public school system.

It is also the Employer's contention that it does not meet the Board's discretionary monetary standards for assertion of jurisdiction. In the fiscal year ending June 30, 1983, the Employer had a total gross revenue of $635,651.93. Of this total, it received $378,094 from the State of Colorado; $4,413 from the school district; $21,750 from the counties, $2,985 from United Way; $21,018 from the Federal government pursuant to the Elementary and Secondary Education Act; $149,686 from the collection of residential fees from clients consisting of their Supplemental Security Income and Aid to the Needy income provided by the State and Federal government; $4,156 from donations; and $1,771 from miscellaneous sources, including contributions pursuant to CETA. The record shows that the Employer is substantially involved in the care, custody and training of mentally retarded and disabled children and infants. The current standard for the assertion of jurisdiction over institutions of this type is a gross annual revenue of $250,000. See, *Aid for the Retarded, Inc.*, 256 NLRB 678 (Advisory Opinion). As noted above, the Employer had a gross annual revenue of over $635,000 in fiscal year 1983, and, therefore, meets the aforesaid discretionary standard. While the State of Colorado is an exempt entity, it still qualifies as a "user" in the same manner and to the same degree as a nonexempt organization, and the State meets the Board's jurisdictional standards. *Los Angeles Building & Construction Trades Council, (Interstate Employers, Inc.)*, 140 NLRB 1249. Therefore, the revenue in excess of $378,000 received from the State is sufficient to satisfy the applicable monetary standard. Also, the $21,018 received from the Federal Government was transferred across state lines and establishes the Board's legal jurisdiction. Accordingly, I find that the Employer meets the Board's standards for assertion of jurisdiction, and I find that it would effectuate the purposes of the Act to assert jurisdiction herein.

[Text of Footnote 2, regarding composition of appropriate bargaining unit, omitted as irrelvant to the issues raised.]

APPENDIX J

WESTERN UNION MAILGRAM

NLRB
1717 Pennsylvania Ave. #250
Washington, D.C. 20570 07PM

4-0041540341002 12/07/83 ICS WA16614
01134 MLTN VA 12/07/83

LAWRENCE W MARQUESS ESQ
BRADLEY, CAMPBELL, CARNEY
1717 WASHINGTON AVE
GOLDEN, CO 80401

RE SOUTHWEST SERVICES FOR DEVELOPMENTAL DISABILITIES 27 RC 6406 EMPLOYER'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION IS GRANTED AS TO THOSE ISSUES RELATING TO THE PROPRIETY OF ASSERTING JURISDICTION OVER THE EMPLOYER, AS IT RAISES SUBSTANTIAL ISSUES WARRANTING REVIEW. THE EMPLOYER'S REQUEST FOR REVIEW AS TO OTHER ISSUES SHALL BE HELD IN ABEYANCE PENDING THE BOARD'S DETERMINATION OF THE JURISDICTIONAL ISSUE. EMPLOYER'S REQUEST FOR ORAL ARGUMENT IS DENIED, BY DIRECTION OF THE BOARD. DATED 7 DEC 1983.

ROBERT VOLGER, DEP EXEC SECY
NLRB WSH DC

04960

22:00 EST

MGMCOMP